United States Court of Appeals

for the Second Circuit



APPELLANT'S APPENDIX

76-7561

United States Court of Appeals

For the Second Circuit

GARDNER-DENVER COMPANY,
Plaintiff-Appellee,

against

DIC-UNDERHILL CONSTRUCTION COMPANY, DIC-CONCRETE CORP., DIC-UNDERHILL J. V. & CO., DIC-UNDERHILL JOINT VENTURE,
Defendants-Appellants,

and

THE PORT AUTHORITY OF NEW YORK and NEW JERSEY,
Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDIX OF DEFENDANTS-APPELLANTS.

PATRICK J. FALVEY
Attorney for Defendants-Appellants
One World Trade Center—
66S
New York, N. Y. 10048

LEFRAK, FELD & FISCHER
Attorneys for Plaintiff-Appellee
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New York, N. Y. 10017

UNITED STATES COURT OF APPEALS
FILED
FEB 2 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

INDEX TO APPENDIX.

	Page
Relevant Docket Entries	1a
Amended Complaint	4a
Answer	7a
Transcript	11a
Motions	97a
Amended Judgment	106a
Defendants' Exhibit B	108a
Defendants' Exhibit C	109a
Defendants' Exhibit I	110a
Defendants' Exhibit J	116a
Defendants' Exhibit K	117a
Defendants' Exhibit L	118a

TESTIMONY.

PLAINTIFF'S WITNESS:

DeMattei, Aldo:	
E.B.T.	46a

DEFENDANTS' WITNESSES:

DeMattei, Aldo:	
E.B.T.	93a
Philip, Sidney:	
Direct	55a
Cross	73a
Redirect	84a
Recross	90a

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

- -X

GARDNER-DENVER COMPANY,

Plaintiff-Appellee,

-against-

DIC-UNDERHILL CONSTRUCTION COMPANY, DIC-CONCRETE CORP., DIC-UNDERHILL J. V. & CO., DIC-UNDERHILL JOINT VENTURE,

Defendants-Appellants,

and

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

- -X

RELEVANT DOCKET ENTRIES.

D C Docket GARDNER-DENVER COMPANY vs. DIC-UNDERHILL CONSTRUCTION COMPANY, ET

P

DATE	NR	PROCEEDINGS	MOTLEY, J
10-30-75	(1)	Filed Complaint and issued summons.	
12-01-75	(2)	Filed ANSWER of defts to the Complaint.	(PJF)
12-02-75	(3)	Filed Third Party Complaint and issued summons.	
12-22-75	(4)	Filed third-pty deft's ANSWER to the complaint.	(G&S)
12-22-75	(5)	Filed ANSWER of third-pty deft. to the third-pty complaint.	(G&S)
12-22-75	(6)	Filed third-pty deft's interrogs. to pltff.	
12-[illegible]-75	(7)	Filed third-pty deft's interrogs. to defts.	
01-07-76	(8)	Filed defts.' third-pty pltffs' answers to third-pty deft's interrogs.	

RELEVANT DOCKET ENTRIES.

01-23-76	(9)	Filed third-pty summons and return- served: St. Paul Fire and Marine Insurance Co. by Louis Zambeto on 12-3-75
02-09-76	(10)	Filed summons and return- served the following: The Port Authority of N.Y. and N.J. by C. Zaffarano on 11-5-75 Dic-Underhill Joint Venture on 11-15-75 Dic-Underhill J.V. & Co.- UNEXECUTED- 11-5-75 Dic Concrete Corp. by C. Shea on 11-13-75 Dic-Underhill Construction Co.-UNEXECUTED- 12-26, 12-27-75, 1-23-76
03-12-76	(11)	Filed third-pty pltffs' answers to third-pty defts interrogs.
03-22-76	(12)	Filed third-pty deft's second interrogs. to defts. & third-pty pltffs.
03-23-76	(13)	Filed third-pty deft's affdvt. and notice of motion for an order for summary judgment pursuant to Rule 56 FRCP. Ret. 04-07-76
03-23-76	(14)	Filed third-pty deft's memorandum of law in support of motion.
4-01-76	(15)	Filed defts & third-pty pltffs' affdvt. of Alan J. Littau in opposition to third-pty deft's motion for summary judgment.
04-07-76	(16)	Filed third-pty deft's reply memorandum of law in support of its motion for summary judgment pursuant to Rule 56 FRCP.
04-29-76	---	Filed memo endorsed on document #1-- all pretrial discovery in this case must be completed within 30 days, i.e. on 5-28-76 and pre-trial and trial schedules as indicated. So ordered- MOTLEY, J.
04-29-76	--	Filed memo endorsed on document # 13-- the within motion will be heard on 5-27-76 at 4:00 p.m. So ordered- MOTLEY, J (m/n)
05-05-76	(17)	Filed third-pty deft's Rule 34 request to defts. & third-pty pltffs.
05-05-76	(18)	Filed third-pty deft's cross-notice of taking deposition of defts. & third-pty pltffs. on 05-10-76
05-06-76	(19)	Filed third-pty pltffs' memorandum in opposition to third-pty deft's motion to dismiss.
05-10-76	(20)	Filed pltff's Rule 34 request to defts. Dic- Underhill and the Port of Authority.
05-12-76	(21)	Filed pltff's notice of taking deposition of defts. Dic-Underhill and the Port Authority on 05-10-76
05-26-76	(22)	Filed third-pty deft. supplemental reply affdvt. of Dennis M. Perlberg in support of the motion for summary judgment.
05-26-76	(23)	Filed third-pty deft. supplemental reply memorandum.
06-21-76	(24)	Filed Amended Complaint.
06-21-76	(25)	Filed pltffs' answers to third-pty deft's interrogs.
06-22-76	(26)	Filed Memorandum Opinion and Order #44631...Pltff in this diversity action seeks to recover from defts the value of an air compressor etc.- the court finds that Dic-Underhill failed to notify St.Paul "as soon as practicable" after discovery of the loss of compressor etc. both Dic-Underhill & its subrogee, the Port Authority,are contractually barred from recovery against St. Paul etc. the court finds that St.Paul did not waive the defense based upon Dic-Underhill's failure to comply with the contractual requirement of prompt notification.The motion for summary judgment is granted on this basis,and the court need not consider the other ground advanced by St. Paul as a basis for summary judgment.So Ordered.MOTLEY,J m

RELEVANT DOCKET ENTRIES

06-30-76	Filed Judgment-- that the third-pty deft. have judgment against defts-third-pty pltffs. dismissing the third-party com laint only. Judgment entered 6-30-76 Clerk. Approved: MOTLEY, J. (m/n)
07-27-76	Filed Jury pre-trial order on consent.. So ordered- MOTLEY, J.
10-08-76	Filed deposition of deft. Dic-Underhill Construction Co. by Also De Mattei taken on 5-10-76
10-08-76	Filed pltff's requests for instructions to the Jury.
10-08-76	Filed defts' request to charge.
10-05-76	BEFORE MOTLEY, J. JURY TRIAL BEGUN AND CONT'D.
10-06-76	Trial cont'd
10-07-76	trial cont'd
10-08-76	trial cont'd and concluded. Jury verdict for pltff. in amount of $ 29,000.
10-15-76	Filed Judgment No. 76,933 that pltff have judgment against defts DIC-Underhill Construction Company, Dic-Concrete Corp, Dic-Underhi J.V. & Co. Inc. Underhill Joint Venture in the amt. of $29,000.00 RAYMOND F. BURGHARDT, CLERK - 10-18-76. Approved by MOTLEY, J m-r
10-26-76	Filed pltff's affdvt. and notice of motion for an order amending the judgment entered on 10-18-76... Ret. 11-3-76
11-12-76	Filed defts. Dic-Underhill Construction Co., Dic-Concrete Carp., Dic-Underhill J.V. & Co. and Dic-Underhill Joint Venture notice of appeal from the final judgment entered on 10-15-76. Copy to: Blackman, Lefrak, Feld and Fischer, Esqs. Ent. 11-12-76
11-11-76	Filed Amended Judgment # 77,010-- that pltff. have judgment against defts. Dic-Underhill Construction Co., Dic-Concrete Corp., Dic-Underhill J.V. &Co. and Dic-Underhill Joint enture in the amount of $29,000. together with interest as indicated for a total judgment of $34,505.00. Clerk. Approved: MOTLEY, J. (m/n)
11-12-76	Filed Supersedeas Bond in total sum of $32,440.00- Seaboard Surety Co.
11-19-76	Filed supersedeas bond re: amended Judgment of 11-11-76- in the sum of $38,551- Seaboard Surety Co.
11-19-76	Filed Defts Dic-Underhill Construction Company, Dic-Concrete Corp., Dic-Underhill J.V. & Co. and Dic Underhill Joint Venture's Amended Notice of Appeal to USCA for the 2nd Circuit from the amended final Judgment filed 11-11-76. m-n to: Blackman, Lefrak Feld & Fischer attys for pltff. 424 Madison Ave, NYC 10017.
11-19-76	Filed defts. notice pursuant to Rule 10(b) of Fed. Rules of Appellate Procedure.
12-02-76	Filed defts-appellants notice of motion for an order to correct record. Ret., 12-08-76
12-06-76	Filed deposition of deft. The Port Aurhority of N.Y. and N.J. by Ronald Francis Rambousek taken on 5-10-76. (m/n)
12-06-76	Filed examination before trial of the defts.& third-pty pltffs. by Sidney C. Philip and Ralph Petagna taken on 5-25-76.
12-7-76	Filed affdvt.of Gerald D.Fischer in opposition to defts motion to include certain documents in the record on appeal....
12-14-76	Filed memo endorsed on motion filed 12-2-76. The within motion is granted. So ordered- MOTLEY, J. (m/n)
01-03-77	Filed notice that the record on appeal has been certified and transmitted to the USCA on this day.

AMENDED COMPLAINT.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GARDNER-DENVER COMPANY,	:	
Plaintiff,	:	AMENDED COMPLAINT
-against-	:	75 Civ.
DIC-UNDERHILL CONSTRUCTION COMPANY, DIC-CONCRETE CORP., DIC-UNDERHILL J.V. & CO., DIC-UNDERHILL JOINT VENTURE and THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,	:	PLAINTIFF DEMANDS TRIAL BY JURY
Defendants.	:	

Plaintiff, by its attorneys, alleges as follows:

1. Jurisdiction is founded on diversity of citizenship and amount.

(a) Plaintiff is a corporation incorporated under the laws of the State of Delaware having its principal place of business in the State of Texas.

(b) Defendants Dic-Underhill Construction Company, Dic-Concrete Corp., Dic-Underhill J.V. & Co. and Dic-Underhill Joint Venture are corporations and partnerships created under the laws of the State of New York having their principal place of business in the State of New York.

AMENDED COMPLAINT

(c) Defendant the Port Authority of New York and New Jersey ("The Port Authority") is a corporate body created by the States of New York and New Jersey, with its principal offices in those states.

2. On or about August 3, 1973 defendants Dic-Underhill rented from plaintiff a Gardner-Denver air compressor Model #1200 DE (Serial No. 599554), having a value of $42,886.

3. The aforesaid air compressor was thereupon delivered to defendants Dic-Underhill at the construction site of the World Trade Center, owned by defendant The Port Authority.

4. Defendants have failed and refused to return to plaintiff the aforesaid air compressor although duly demanded.

COUNT I

5. By reason of the foregoing, plaintiff has incurred damage, and defendants Dic-Underhill are liable to it, in the amount of $42,886, no part of which has been paid although duly demanded.

COUNT II

6. By reason of the foregoing, plaintiff has incurred damage, and defendant The Port Authority is liable to it, in the amount of $42,886, no part of which has been paid although duly demanded.

AMENDED COMPLAINT

WHEREFORE, plaintiff demands judgment against the defendants as follows:

(a) On Count I of the complaint in the amount of $42,886 against defendants Dic-Underhill.

(b) On Count II of the complaint in the amount of $42,886 against defendant The Port Authority together with interest and the cost and disbursements of this action.

Dated: New York, New York
February 27, 1976

LEFRAK FISCHER & MYERSON

By _____
(A member of the firm)
Attorneys for Plaintiff
Office and P.O. Address
424 Madison Avenue
New York, New York 10017
(212) 421-7633

ANSWER.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GARDNER-DENVER COMPANY,	:	75 Civ. 5417
Plaintiff,	:	Judge Motley
- against -	:	ANSWER
DIC-UNDERHILL CONSTRUCTION COMPANY, DIC-CONCRETE CORP., DIC-UNDERHILL J.V. & CO., DIC-UNDERHILL JOINT VENTURE and THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,	:	
Defendants.	:	

Defendants, by their attorney, PATRICK J. FALVEY, answering the complaint of the plaintiff, respectfully show to this Court and allege as follows:

I. Deny each and every allegation contained in paragraph designated "1" of the complaint as follows:

a. Deny knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph designated "1(a)" of the complaint;

b. Deny each and every allegation contained in paragraph designated "1(b)" of the complaint, except admit that DIC Concrete Corporation and Underhill Construction Corporation are corporations organized and existing under the laws of

the State of New York and, for the purposes of Contract WTC-117.00 relating to the World Trade Center, operating as DIC-Underhill, a joint venture, and further have their principal places of business in the State of New York;

(c) Deny each and every allegation contained in paragraph designated "1(c)" of the complaint, except admit that the defendant The Port Authority of New York and New Jersey is a body corporate and politic created by Compact by the States of New York and New Jersey with the consent of Congress, is an agency of both said States and has its principal office at One World Trade Center, New York, New York.

II. Deny each and every allegation contained in paragraphs designated "2", "3" and "4" of the complaint, except admit that on or about August 3, 1973, defendants DIC-Underhill rented from plaintiff a certain air compressor which was received by defendants DIC-Underhill at the World Trade Center, owned by defendant Port Authority, and that said compressor was stolen, through no fault of the defendants, by persons unknown.

III. Defendants deny that they or any of them are liable to the plaintiff for the amount demanded by the plaintiff.

ANSWER

AS AND FOR A SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE ON BEHALF OF DEFENDANTS DIC-CONCRETE CORP. AND DIC-UNDERHILL CONSTRUCTION CO.

IV. That said defendants are, operating as DIC-Underhill, a joint venture, pursuant to the provisions of Contract WTC-117.00 between themselves and The Port Authority of New York and New Jersey, the agents of defendant Port Authority for the performance of certain concrete construction in connection with the construction of the World Trade Center.

V. That these defendants acted solely as disclosed agents for a disclosed principal, and therefore there is no separate and distinct liability on the part of DIC-Underhill to this plaintiff.

AS AND FOR A SECOND SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE ON BEHALF OF DEFENDANT THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

VI. The Port Authority of New York and New Jersey (Port Authority), is an agency of the States of New York and New Jersey and subject to suit only upon compliance with the express conditions precedent contained in the legislation permitting the maintenance of certain suits against said defendant (Chap. 301, Laws of N.Y. 1950; Chap. 204, Laws of N.J. 1951;).

VII. The plaintiff herein did not commence this action within one year after the cause of action therefor accrued, nor did the plaintiff serve a Notice of Claim within the time required. Both the institu-

tion of suit within one year and the service of a statutorily-required Notice of Claim are conditions precedent to the maintenance of an action against defendant Port Authority.

VIII. By reason of the failure to comply with both statutory conditions precedent, this Court lacks jurisdiction of the person of defendant Port Authority and over the subject matter of this action insofar as it relates to said defendant.

WHEREFORE, it is respectfully requested that this Court render judgment in favor of the defendants dismissing the complaint, together with costs and disbursements.

DATED: New York, New York
November 25, 1975

PATRICK J. FALVEY

By: _____

Attorney for Defendants
Office & P.O. Address
One World Trade Center - 66S
New York, New York 10048
466-8753

TRANSCRIPT.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

GARDNER-DENVER COMPANY, :

Plaintiff, :

- against - :

DIC-UNDERHILL CONSTRUCTION COMPANY, etc., :

Defendants. :

----------X

New York, N. Y.
October 6-7, 1976

B e f o r e:

HON. CONSTANCE BAKER MOTLEY,

District Judge
and a Jury

Appearances:

LEFRAK, FISHER & MYERSON, Esqs.
Attorneys for Plaintiff
BY: GERALD FISCHER, Esq.

PATRICK FALVEY, Esq.
Attorney for Defendants
BY: A. J. LITTAU, Esq.

EXCERPTS

mdwc 1

(In the robing room)

THE COURT: I received, as a result of my request, a memorandum from defendants in this case raising questions which I don't see even mentioned in the pretrial order.

MR. FISCHER: That is one issue. I first read it this morning. I wasn't in my office yesterday.

THE COURT: Let us take this first issue about the Port Authority. The claim is that the Port Authority cannot be sued here because the suit was filed more than a year after the cause of action accrued and is barred by a special statute of limitations applicable to the Port Authority. Is that so?

MR. FISCHER: That is the position they are taking.

THE COURT: What is your position?

MR. FISCHER: The facts, which I will give you very briefly, and they are stipulated --

THE COURT: I know the facts. I am asking you what is your reply to the claim there is a one-year statute of limitations with respect to suits brought against the Port Authority?

MR. FISCHER: The response to that, your Honor, is that as soon as the theft was discovered, which was the

mdwc 2

next morning, Dic-Underhill told us that we should send in a bill and they would turn it over to the Port Authority for their insurance agent to focus on, and their insurance agent then began to process the claim, so the 90-day proviso of the statute -- that is, you have to file proof of claim within 90 days, and then you have one year to sue.

Mr. Weinstock, the agent for the Port Authority, then sent a letter to the Port Authority eighteen months later turning down the claim and saying it was not covered by the Port Authority insurance policies.

We sued promptly thereafter.

THE COURT: The issue is whether you were required to file the suit within the one-year statute of limitations. You have complied with the first requirement to file a claim 60 days prior to the suit; is that it?

MR. FISCHER: Yes, your Honor. And the issue of waiver by the Port taking the claim, telling us they would be back to us, and then rejecting it, and we suing promptly thereafter.

THE COURT: The issue is whether your having filed the claim did not relieve you of the responsibility to commence this action within one year.

MR. FISCHER: That is the position of the Port.

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mdwc 3

THE COURT: I am asking you for your answer.

MR. FISCHER: My answer is they waived the one-year statute by dealing with us and turning it over to their carrier.

THE COURT: Do you have a case to support that?

MR. FISCHER: I just read the brief this morning. The issues in the pretrial order don't raise any of the defenses. The issue in paragraph 8 is whether or not the defendants were negligent in the treatment of this compressor.

Secondly, the statute of limitations defense does not apply to Dic-Underhill. Dic-Underhill ordered the compressor, it was delivered to them, and the issue is whether they are negligent in possession.

We say (a) they weren't agents for the Port, and secondly, if they were agents for the Port, an agent can commit a negligent act, and it did. It did not protect our property.

THE COURT: Let us take one issue at a time. The issue we are on now is whether the Port Authority is properly in this action, since the suit was obviously commenced more than two years after the loss was discovered. Isn't that so?

MR. FISCHER: That is correct, your Honor. Here

mdwc 4

is a letter from the Port's insurance agent to Dic-Underhill dated 1975 saying, "We have the claim that you submitted to us on August 16, 1973, which was the date of the theft, and you had better notify Gardner-Denver that we are not honoring this by the policy with the Port Authority."

This action was commenced then in October 1975, within one year from the time we were told the claim was not going to be honored.

THE COURT: This was more than a year after this loss occurred, that you got this letter, March 27.

MR. FISCHER: That is right. You will see the first sentence says with respect to the claim filed by Dic-Underhill and the Port Authority in 1973, August 16, 1973.

In any event, the one-year statute has no applicability to Dic-Underhill, the contractor who ordered and rented the equipment from us and who thereafter failed to invoke proper security to protect that equipment.

THE COURT: Let me ask you, sir: You represent the Port Authority?

MR. LITTAU: Yes, and Dic-Underhill.

THE COURT: This letter relates to a claim made by Dic-Underhill of the joint venture to its insurance

mdwc 5

company.

MR. LITTAU: We have a situation here, your Honor, if I can take a couple of sentences --

THE COURT: I want to clarify something. The letter of March 27 is a letter from Weinstock to Dic-Underhill relating to a claim made by Dic-Underhill. The issue is whether you, the plaintiff, filed a claim with the Port Authority 60 days prior to the suit or at ary other time. Did you file a claim?

MR. FISCHER: Yes. We have cases that say -- the records of the Port --

THE COURT: No, you have to try to answer the questions. Otherwise I have to repeat it.

Let me see a copy of your claim.

MR. FISCHER: I will show you the police report.

THE COURT: I want a copy of your claim that you filed in connection with this statute which limits time for filing suits against the Port Authority to one year. I want to see the claim which you filed pursuant to that statute.

MR. FISCHER: We have the police report of the Port Authority advising them that they were advised by Dic-Underhill that Gardner-Denver's compressor has been stolen, and they began an immediate investigation, and the

mdwc 6

Port was then put on notice that that compressor was stolen.

THE COURT: You rely on something which is headed "Port Authority Police, Crime Complaint Report." Is that it?

MR. FISCHER: That and the testimony of the witness who will say that he was called up on the morning of August 16 or 17 by Dic-Underhill to tell the plaintiff that their compressor had been stolen and that the police of the Port Authority were conducting a full investigation of the facts. The cases we have in New Jersey, the New Jersey cases, say that if the claimant has put the defendant on notice of the theft so that a full investigation can be done, that that is de facto compliance with the statute.

THE COURT: What cases do you have?

MR. LITTAU: Your Honor, even if we accept --

THE COURT: Wait a minute. Let us try to do one at a time. You will have a chance to reply.

MR. FISCHER: Zamel v. Port Authority.

THE COURT: The next question is, I have read the headnote at least on this case which you have handed me, Zamel v. Port Authority of New York, 264 Atlantic 2d 201, a 1970 case, in the Supreme Court of New Jersey.

mdwc 7

However, in this New Jersey case which you have handed me, now that I have read the opinion, it appears that the accident occurred on January 15, 1968, and the suit was filed on January 7, 1969, within the one-year statute of limitations.

MR. FISCHER: Both those cases relate to the 90-day provision,not to the tolling of the one-year statute of limitations, and that is all I was responding to.

THE COURT: So that the issue now is whether your having failed to commence this suit within a year bars the action against the Port Authority.

MR. FISCHER: Correct.

THE COURT: It does?

MR. FISCHER: No, that is the issue.

THE COURT: What do you have to say that you can file it more than a year later despite the fact that they had notice and all the information they needed long before the expiration of the 60 days,as evidenced apparently by this Port Authority Police Crime Report?

MR. FISCHER: The claim was rejected on March 27, 1975, and it is our position the actions of the Port Authority constitute a waiver or a tolling of the one-year statute of limitations.

THE COURT: Do you have a case that supports

mdwc 8

that?

MR. FISCHER: Not at this moment, your Honor. Those are only two cases that exist under the annotations to the New Jersey statute and the New York statutes relating to waivers. None discuss the possibility of the waiver of the one-year statute of limitations. Unless Mr. Littau knows, this is a question of first impression, and the facts will show that the activities and actions of the Port and Dic-Underhill constitute a waiver of the one-year statute.

THE COURT: I will hear from you now.

MR. LITTAU: May I start with the insurance aspect, because that seems to have put us into a funny posture.

As part of the construction of what many people have either praised or damned, i.e., the World Trade Center, we obtained in order to save costs a blanket policy, a so-called wrapup insurance policy, consisting of three policies with three separate companies, so that contractors would be protected to the extent of any given policy coverage. This was our attempt to save some construction costs. That is why Dic-Underhill, our contractor, under Contract No. 117, told Gardner-Denver, "Go see the insurance company," because Dic-Underhill

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mdwc 9

believed it was covered by a policy.

The company that Dic-Underhill told Gardner-Denver to submit a claim to turned the claim down as being not covered eighteen months later, almost two years later, at which point Gardner-Denver commenced a lawsuit a little over two years after the theft.

That is the insurance aspect.

MR. FISCHER: There is one more aspect, the third-party defendant -- if your Honor will recall, there was another insurance carrier that was brought into this case. That was the one that covers Dic-Underhill separately and apart, whom they apparently never turned it over to, they just sent it on to the Port.

THE COURT: If you interrupt him when he is talking, the reporter is not able to get it and the record is confused. Now, I required him to cease talking while you could explain yourself, and now he is talking and you interrupt him to bring in something else. Please don't do that.

MR. FISCHER: I am sorry.

THE COURT: What were you saying?

MR. LITTAU: Your Honor, first of all, the St. Paul Insurance Company, which was Dic-Underhill's personal, you might say, insurance company, has nothing to do with the

mdwc 10

case in this posture.

After suit was started by Gardner-Denver, I submitted an answer on behalf of all then defendants, the Dic-Underhill Joint Venture and the Dic Corporation, the Underhill Corporation, and the Port Authority. I was required to defend and indemnify the Dic-Underhill organization under the terms of our contract.

In the answer I specifically set out as affirmative defenses (1) the fact that Dic-Underhill was a disclosed agent acting for us under a contract, and (2) that plaintiff Gardner-Denver had failed to comply with the statute under which a suit could be brought against us, specifically, I referred to notice of claim; but, even beyond that, the fact that far more than one year had gone by since the date of the theft before suit was instituted.

I think this Court has faced this situation squarely in the Rao case, cited in my brief, where the argument that was made by that plaintiff was that since a period of 60 days had to elapse after the service of a notice of claim before he could institute suit, that he was entitled to a 60-day extension of the one-year period.

Judge Rayfiel in Eastern District said no. He said it is an ingenious argument, but no, no jurisdiction. And the Second Circuit unanimously upheld Judge Rayfiel on

mdwc 11

his opinion.

So we have our circuit here having passed specifically on it.

We have the Court of Appeals in New York State in the Trippe case, Trippe v. Port Authority, 14 New York 2d, page 119, I believe, where I had the privilege of doing the basic research for the Court of Appeals brief, and there Judge Desmond in the lead of the three opinions which unanimously reversed the courts below referred to the sweeping, all-inclusive provisions of the statute and that the only exceptions to be found were the exceptions that were named in the statute.

I will just address myself to the one year, your Honor. There it is. You need not worry whether the employee's report is the equivalent. I will concede that for the purposes of this argument. I won't contest that. But, your Honor, far more than the one year went by before suit was instituted, and I will rest on that, Honor, insofar as Port Authority is concerned, and I believe insofar as the disclosed agent Dic-Underhill is concerned.

THE COURT: Gentlemen, with respect to the next problem, I have heard both parties on whether the Port Authority action is barred by the one-year statute of

mdwc 12

limitations. The next question I want to take up is the claim of Dic-Underhill that it is entitled to the same defense.

I gather you are not making that claim. You are claiming that since Dic-Underhill was a disclosed agent of the Port Authority --

MR. LITTAU: There is no separate liability as to it, and therefore in essence, your Honor, it wouldn't come under the same defense.

THE COURT: I will hear you as to that.

MR. FISCHER: There is no concession by the plaintiff. Indeed, the stipulated facts in the pretrial order are that Dic-Underhill ordered the equipment. We don't concede they ordered it as agent for the Port Authority. We have the deposition of the Port Authority's own witness, Mr. Petagna, and the question was asked, "Do you know if the compressor rented from Gardner-Denver was rented in their capacity as agents for the Port Authority?

"Answer: No. As a matter of fact, there was a question of fact as to whether it was to be used on the 117 contract."

The 117 contract was a contract under which they are entitled to act as agents in entering into contracts.

"Or one of his lump-sum contracts, where he is acting as a contractor." At that time the contract 117-4A.

mdwc 13

"Question: Has that question been resolved?

"Answer: Not to our knowledge."

It is our position we got a call from Dic-Underhill. We wrote up an order to deliver a compressor to Dic-Underhill. Two weeks later Dic-Underhill calls us up and says it is stolen.

As far as we can gather, Dic-Underhill, according to Mr. Petagna's deposition, acted as a contractor as well as agents. On his own deposition he was asked,as I have read to your Honor, was this compressor rented in their capacity as agents for the Port Authority.

"Answer: No."

The issue in this case is, did Dic-Underhill rent this as an agent for the Port Authority? Passing that issue --

THE COURT: Just a moment. Dic-Underhill was the contractor for certain work on the World Trade Center site, is that it?

MR. FISCHER: Correct.

THE COURT: And had a contract with the Port Authority for that work, whatever it was.

MR. FISCHER: It apparently had several contracts, one where it acted as contractor and one where it acted as agent for its own account and for the account of the Port.

mdwc 14

The issue was under which contract did this fall.

THE COURT: What is your claim against Dic-Underhill in this action?

MR. FISCHER: The claim against Dic-Underhill is that they called us up, they ordered a compressor, we delivered a compressor, that compressor we are told was stolen.

We accept all that and it is stipulated. The issue then is were they negligent. Was Dic-Underhill in taking our property negligent?

Whether or not they are agents, leaving that aside, your Honor, if an agent -- assuming that question is decided by the jury against us, we say they were negligent in failing to invoke proper precautions to watch our compressor.

THE COURT: I will ask you to reply to that.

MR. LITTAU: On page 25 of the transcript of the testimony Mr. Petagna was asked the question, "Do you know if this was rented as," and his answer starts out "No."

I submit that the word "No" is in answer to the question "Do you know it was rented," and he says "No."

THE COURT: Let us assume Dic-Underhill is the agent of the Port Authority. The claim here is, as I understand it, that Dic-Underhill is charged with negligence

mdwc 15

with respect to protecting this property, and because that is the claimed negligence he is not exempt from liability because the principal may be. What do you say to that?

MR. LITTAU: I say there is no separate liability as to Dic-Underhill.

THE COURT: In negligence?

MR. LITTAU: Yes, your Honor. Where the agent is acting within the scope of the agent's agency.

We have the contrary, the converse, of this situation quite well shown by the Court of Appeals case.

THE COURT: What case are you relying on?

MR. LITTAU: I am thinking of Sorter v. New York Trib. 303 N.Y., which is an assault case. I didn't try to go into trying to point out the differences, but the frequent situation arises, as in Sorter, and in later cases, where the employee has been beyond the scope of his employment. The employee is an agent of a corporation where he acts within scope.

In assault cases, as in Sorter, where a New York City bus driver kicked the -- no, I am sorry, the opposite. The New York City bus driver was kicked in the face by the driver of the Herald Trib. truck. Knowing that he couldn't get at the driver he sued the Herald Trib, and who wouldn't have. The Court of Appeals in New York State

mdwc 16

held that the driver of the truck had gone outside the scope of whatever agencyhe had, whatever employment he had.

Those are the limitations, I say, your Honor. Where there is an action within the scope of employment, within the scope of agency, then it is a respondeat superior type of situation, principal and agent. The principal responds. The agent is his tool, his alter ego. I believe that one of the exhibits --

THE COURT: With respect to that, you cite in your brief Jones v. Archibald.

MR. LITTAU: Yes, your Honor. 45 A D 2d 532, at page 534, Fourth Department case, 1974.

THE COURT: In that case the Court says at page -- I don't have the Appellate Division page, but I have the New York 2d page. That is 360 N Y S 2d 119, and this is at page 122. The Court says: "The fact that an agent acts for a disclosed principal will not relieve him of liability for his negligent acts even though the principal may also be liable."

Isn't that what they held there?

MR. LITTAU: I try never to miscite a case, your Honor. If that is what the case says, so be it. I did not believe that it had.

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mdwc 17

THE COURT: With respect to this other point, the Port Authority action is barred on the authority of Rao v. The Port of New York Authority, 122 F. Supp. 595, a 1954 case which was affirmed by the Court of Appeals for the Second Circuit in Rao v. The Port of New York Authority, at 222 Federal Reporter 2d 362 (1955).

I believe that disposes of the questions which you have raised, Mr. LIttau, in your trial memorandum here.

Is there another question?

MR. LITTAU: No. We had the agency. Has your Honor ruled on that, as to whether there is a possibility of separate liability?

THE COURT: I thought I ruled on that where I pointed out that in the case on which you rely the agent may be liable for negligence even though he is a disclosed agent.

MR. LITTAU: If he is acting within the scope of his agency, his negligence is the negligence of the principal. I was advised last night before I left the office, and it was too late to send it, Judge Whipple in New Jersey had rendered a letter opinion which is in part pertinent to the discussion here where in a case called Tierney v. Governor Byrne et al., he commented on, as he said, the allegations of the complaint against the Authority

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mdwc 18

and its Commissioners. He held that even as to individuals, i.e., our Board of Commissioners, the complaint had to be within a year and was thus barred. I have copies of his letter opinion which, as I say, I was advised of quite late yesterday evening without the possibility of being able to serve copies.

THE COURT: Let me see if I understand the point you are making. You are back on the point of whether the Port Authority suit being barred --

MR. LITTAU: No, your Honor, the agency. Because on page 2 in the second paragraph from the bottom he starts out talking about these defendants, i.e., the Authority and its Commissioners, and he says the Commissioners are sued in their official capacity, and he says the defense would also be available to the Commissioners, the one-year statute.

Dic-Underhill is being sued as our agent under this contract, and I believe that it carries along.

THE COURT: First of all, Dic-Underhill, if I undertood their counsel a moment ago, challenges the agency relationship with respect to this particular machinery. That is the first disputed issue of fact.

MR. LITTAU: Plaintiff disputes that, yes, your Honor.

mdwc 19

THE COURT: Secondly, the question is whether by some contract agreement with the Port Authority he is relieved of all personal responsibility. This case holds if he is not, the fact that he is a disclosed principal would not relieve him of responsibility for his negligent acts. That is what I am ruling.

We have two disputed issues: First, whether he is agent for the Port Authority in this instance; secondly, whether by some contractual relationship with the Port Authority he is relieved of personal responsibility for negligence in connection with this World Trade Center project; third, if he is not, was he -- well, no, we have to try the issue of negligence in any event, as to whether he was negligent. And if he is found to be, then of course the question is whether he is relieved of that negligence responsibility by virtue of some contract.

Let us proceed, then, gentlemen. I think we have covered all of your points.

MR. FISCHER: May I make one comment for the record just so I state my objection on the record?

Your Honor, a pretrial order was entered in July stating the issues to be tried. The issues were contained in paragraph 8. Nowhere is there mentioned any issue that Dic-Underhill did or did not act as agent on

mdwc 20

behalf of disclosed principals. Nowhere is there a statute of limitations raised.

THE COURT: He said he raised that in his answer.

MR. FISCHER: That is correct. Which was filed about a year before the pretrial order.

It seems an idle effort on my part to prepare this, to submit it to counsel, to ask him what are the issues he proposes to try, have him sign his name to those issues, and then come in and file a brief the day before the trial raising issues that are not the subject of the pretrial order.

THE COURT: That is highly irregular, to sign a pretrial order saying that those are the issues and then on the eve of trial notify the Court without having filed any brief that there are serious jurisdictional problems. That is another problem. That is why I directed you yesterday to file a brief. Certainly, if there is no jurisdiction, you can raise the issue at any time. But the issue of agency as a disputed issue of fact certainly should have been raised in a pretrial order.

MR. LITTAU: I agree with your Honor it was most irregular if I did what your Honor says. I do not practice law that way. I believed that the agency point was in issue since the filin- of my answer, and had never been

mdwc 21

waived. How I overlooked it in the pretrial order is a question of what my mind was doing that day. I don't know. I never intended to waive it.

When Mr. Fischer questioned some of the documents I was sending saying, "Please be advised I intend to offer these," the pretrial order speaks of further exhibits shall be sent along promptly and advise the other side. I did this. I sent portions of the contract along saying this is a contract provision I intend to rely on. This is a photograph I intend to introduce.

Mr. Fischer wrote back and said he is very disturbed because these relate to issues that were not raised. I said these issues have been there all along. Your Honor is right. If I did what your Honor said, it was reprehensible. These issues were brought up before.

THE COURT: Let us take issue 8(a): Did the plaintiff deliver to defendants a Gardner-Denver air compressor Model No. 1200DE (Serial No. 399554) for lease, and did defendants fail to return said compressor to plaintiff?

Is that disputed?

MR. LITTAU: No, your Honor.

MR. FISCHER: That is admitted.

THE COURT: So that is not an issue to be tried. It is not disputed.

mdwc 22

MR. LITTAU: No, your Honor.

MR. FISCHER: That is admitted.

THE COURT: So that is not an issue to be tried. It is not disputed.

The next is (b): Did plaintiff incur damages of $42,886 as a result of the nonreturn of the said compressor?

That is disputed?

MR. LITTAU: Yes, your Honor.

THE COURT: The next is (c): Were the defendants negligent in their holding and protection of the compressor and did they take such precautions as ordinary prudence would dictate?

There are how many defendants left? I dismissed the Port Authority.

MR. FISCHER: They are all Dic-Underhill defendants. We have been treating them as one group of defendants.

THE COURT: In order to avoid confusion for the jury, I will tell them there is only one defendant, and that is Dic-Underhill, and at the conclusion of the case we will submit to them interrogatories, so that we will understand the basis of their decision, and so forth.

The defendants will then be referred to as the

mdwc 23

Dic-Underhill Group.

Those are the two issues we are going to try.

The third one was the one you suggest, or the other two which I mentioned. Well, with respect to the issue of negligence, as I indicated the Dic-Underhill Group would be liable for their own negligence even if they were the agent of the Port Authority.

The next question is whether there is any contractual agreement between Dic-Underhill Group and the Port Authority which would relieve Dic-Underhill of any liability for their own negligence.

MR. FISCHER: Vis-a-vis the plaintiff? They have a contract which we never saw and their own relationship between themselves should be the subject of indemnification, cross-claims, whatever.

THE COURT: Then that would be a question of law which would be reserved for the Court.

MR. LITTAU: Yes.

THE COURT: So we only have these two questions, B and C, as set forth in the pretrial order.

MR. LITTAU: May I suggest the question of whether they are acting as agent is a question of law for the Court.

MR. FISCHER: I don't think so. I think it is

mdwc 24

an issue of fact as to whether or not vis-a-vis --

THE COURT: That is what I thought I had just clarified. Let us go over that again, so make sure we are in agreement on that. I thought we concluded that whether it was the agent or not he would be liable for negligence, his own negligence in the situation. Is that correct?

MR. FISCHER: Correct.

My adversary is arguing Dic-Underhill was acting as agent for the Port Authority and therefore should not be liable because even if they were negligent they should not be liable.

We are arguing all the facts will show they were not acting as agent for the Port Authority and (b) even if they were acting as agent for the Port Authority, then they are still liable because they were negligent.

Mr. Petagna said in his deposition in renting equipment they never acted as agent for the Port Authority.

THE COURT: I am talking now about whether there is any issue for the jury on agency.

It seems to me there might be with respect to any claim for indemnity. That is, let us assume that the jury finds that Dic-Underhill was negligent in this situation. Then the next question is whether they are to be indemnified.

mdwc 25

MR. LITTAU: Isn't that question before you?

THE COURT: Not for the jury, but the next issue is whether they are to be indemnified by the Port Authority. I gather you are suggesting that that issue might turn on whether with respect to this item they were acting as agent for the Port Authority. Is that it?

MR. LITTAU: Yes, your Honor.

THE COURT: In which case you say that is a question of law?

MR. LITTAU: I believe so, your Honor.

MR. FISCHER: I don't believe that issue is in the case. They can assert a cross-claim against the Port for indemnification. That is between them if they are found to be agents by the jury.

THE COURT: There is no cross-claim.

MR. LITTAU: The only reason the agency would be a question of law for the Court would be in that if the jury finds Dic-Underhill negligent, and the Court finds that under the contract between Port Authority and Dic-Underhill there is the intent of the Port Authority to indemnify its agent, then I believe the Court may find as the issue of law that there is no intent to --

THE COURT: I may have to get to that, but we don't have to get to that now, because we are only talking

mdwc 26

about issues to be submitted to the jury, (b) and (c), as we have just gone over them.

MR. FISCHER: I disagree. If my adversary is raising the defense which he did not raise in the pretrial order that Dic-Underhill was the agent for a disclosed principal, we say the facts do not bear that out, and we dispute that. They were acting as a contractor under the separate contract and not as agents for anybody.

THE COURT: For the purposes of the jury right now it does not matter. We just concluded that, did we not?

MR. FISCHER: It does matter.

THE COURT: It does not matter whether he was the agent or not, he would be liable for negligence. Isn't that what we concluded? For the purposes of the jury.

MR. FISCHER: Then I don't understand what Mr. Littau said had to be decided by the Court.

THE COURT: He is talking about later.

MR. FISCHER: If it is found that Dic-Underhill is negligent, our position is they are liable and that is the end of the case, and the Court and the jury has to decide that. The issue of agency which he seeks to raise --

THE COURT: I gather he is assuming that some action might be brought by Dic-Underhill for indemnity. That is what he is really suggesting. We pointed out there

mdwc 27

is no cross-claim here so that in this action I don't have to rule on that.

But I guess he has in mind later in an action for indemnity the agency issue might be relevant.

I think we have covered it now.

MR. LITTAU: May I suggest this was introduced on the examination of the witness Mr. Wollerman, who was produced on behalf of plaintiff Gardner-Denver, and when I asked about what invoice was sent by Gardner-Denver, this paper was produced, and here is a copy of it, and it is addressed to, as your Honor sees, Dic-Underhill, agent Port Authority.

THE COURT: That is clearly relevant to any issue of agency, but we have agreed we don't have that issue for the jury. It may come up later in a subsequent suit by Dic-Underhill, but it is not before us now. So I think we have got the matters cleared up now and we can proceed with other matters before we call up the jury.

MR. FISCHER: May I have a standing objection, because I know your Honor will overrule it, to all the documents my adversary is going to submit relating to the contract between itself and Dic-Underhill on the issue of agency, because --

THE COURT: Those are not going to come in, so we

mdwc 28

can rule on that now, because we don't have any agency issue,as I see it, before the jury.

MR. LITTAU: It is a matter where I respectfully suggest that the Court might take testimony outside of the presence of the jury so that --

THE COURT: No.

MR. LITTAU: I would like to make an offer of proof,then.

THE COURT: No. You have not raised it by cross-claim here.

MR. LITTAU: I believe it goes to my defense, and I would like to make an offer of proof informally, which would be to submit a copy of contract WTC 117 between the Port Authority and the Dic-Underhill Group and Joint Venture to show, as I submit, the intent to treat Dic-Underhill as the agent in connection at least with the rental of equipment so that there would be no separate liability on the part of Dic-Underhill.

I would also for that purpose submit this invoice numbered 9891197, which was sent by Gardner-Denver to Dic-Underhill.

I would also for the same purpose submit a letter dated February 27, 1974, sent by Gardner-Denver Company again to Dic-Underhill, "Agents," for the Port

mdwc 29

Authority.

I would also submit an invoice dated April 17, 1970, numbered 9890880, where Gardner-Denver sold a compressor to "Port Authority c/o Dic-Underhill," in connection with the construction at the World Trade Center.

I would also submit in the same offer of proof checks dated July 31, 1973, numbered 3093 and 3094, the endorser being Dic-Underhill, purchasing agent Port Authority account, on each check, and payable to the order of Compressor and Rock Service, which I submit to your Honor is undeniably a division of Gardner-Denver, because that name as a division shows on the invoices which I have previously mentioned in this offer of proof.

MR. FISCHER: Yes.

MR. LITTAU: That would end my offer of proof.

THE COURT: You are offering that to prove what?

MR. LITTAU: Agency, your Honor, and through the agency the fact that there was no intent to have Dic-Underhill separately responsible for such claims as these.

THE COURT: The question is, isn't that the subject matter of a cross-claim against the Port Authority which should have been made in this action, or it is possible perhaps for them still to make that claim if and when the jury finds him liable here.

mdwc 30

MR. LITTAU: I agree with that, your Honor, but I believe that the theory of the Archibald case in 45 A D 2d, in our Fourth Department, speaks of an intent to -- I believe the Court says to super-add the liability of the agent on to the liability of the principal, and where there is no such intent, I believe the tenor of the Court's decision is that it is the principal only that stands to answer for the acts of its agent and not the agent until the intent to super-add.

THE COURT: Let us assume this goes to the jury on the question of the negligence of the Dic-Underhill, and the jury finds that Dic-Underhill was not negligent.

MR. LITTAU: That ends it.

THE COURT: Then that would end this case.

But if the jury found that Dic-Underhill was negligent, then it seems to me it is incumbent upon Dic-Underhill to raise in some action that he has been indemnified or saved harmless somehow by the Port Authority.

He might have done it in this action by a claim over against the Port Authority or an indemnity claim against the Port Authority. That has not been done. Am I correct in that?

MR. LITTAU: That is correct. May we go off the record for a second?

mdwc 31

THE COURT: No, we don't have anything off the record in these cases.

MR. LITTAU: As your Honor will then appreciate, it is and was a most delicate situation having to appear for, under what we conceive the terms of the contract to be, our contractor agent, having to appear for and to indemnify them and to represent them in such a lawsuit, and to maintain the rapport, if any, that exists during the completion of their work, which is of course a considerable consideration, or to tell them, "Go out and find your own law firm and defend yourself."

THE COURT: In any event, the Court finds that that issue is not properly before it in this action. Whether the Port Authority has agreed to render Dic-Underhill harmless in any suit brought against it in connection with activity on the World Trade Center site might be a subject of some other suit, but that is not here, so we won't receive those offers of proof that you have set forth now on the record.

All right, gentlemen. Is there something else we should take up? Are there any special questions you want submitted on the voir dire other than the usual, normal questions, whether they are connected with any of these companies or anything like that?

mdwc 32

MR. FISCHER: No, your Honor.

MR. LITTAU: The only thing is, once in a while, your Honor, we have found that someone as a member of a prcfessional organization, to use our own terms, like the Bar Association, there are many engineering and secretaries assocaitions and they don't think offhand, the jurors don't think offhand, about these, and once in a while during questioning in state court on the voir dire, where we do our questioning we will find out about a juror who all of a sudden will say, "Oh, yes, I am a member of the Society of Civil Engineers or the National League of Secretaries Association, and I know Mr. X or Madam Y quite well"--

THE COURT: Who is a party to the case?

MR. LITTAU: --now that I think that person is employed by the Port Authority, and I would ask that a general question of this be put: "Do any of the jurors belong to such a professional organization where they may have developed a personal relationship with a Port Authority employee,"which I would not want to enter into this case.

THE COURT: We will go into that, certainly, if anybody is employed by the Port Authority or any of the other defendants here, the various companies treated as the

mdwc 33

Dic-Underhill Group. We will go into that.

Do you have anything special for the voir dire?

MR. FISCHER: No, but I have proposed requests to charge which were served upon my adversary.

THE COURT: Do you have any requests to charge?

MR. LITTAU: No, I have not,typed. I have two that I may ask for, and I have some objections to those which I will make at the proper time. I don't have them typed.

THE COURT: Please get those in tomorrow. I gather this will be a short trial.

Incidentally, gentlemen, we are not going to proceed this afternoon. I have another matter which is going to commence at 2 o'clock. We are going to go now until 1 o'clock. I am going to have to take a brief recess at 12:30, but other than that, we are going to select a jury and go as far as we can, and we are going to continue this trial each day from 9:30 to 1 o'clock, and I have another matter which has to proceed each day at 2 o'clock, so this will be a morning trial only.

MR. FISCHER: Hopefully we will be finished by tomorrow.

THE COURT: We will try to go as far as we can.

MR. LITTAU: I have my witnesses due in at noon,

mdwc 34

your Honor, so that if for any reason --

THE COURT: We can select a jury in half an hour; we generally do in the civil cases, because there are only six.

Bring up the jury so we can proceed.

* * *

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MR. FISCHER: At this point, your Honor, I would like to read from the deposition of Aldo DeMattei, an employee of Dic-Underhill Corporation.

THE COURT: Do you have the original?

MR. FISCHER: Yes, your Honor (handing to the Court).

May I explain to the jury what this is?

THE COURT: Yes. I will explain it to them. I think you indicated to the jury in your opening statement that you would be reading from the depositions of various witnesses taken before trial pursuant to the rules of our court, which permits a party in a litigation such as this to examine witnesses before trial under oath, to ask some questions in the presence of opposing counsel. Opposing counsel has the right to cross-examine the witness. Then if the witness is unavailable at the time of trial, the testimony of that witness may be used on the trial.

So Mr. Fischer is about to read to you the testimony of a witness, I gather, who is not available?

MR. FISCHER: Well, he is an employee of the defendant.

THE COURT: Oh, it is the defendant's witness.

MR. FISCHER: Yes.

THE COURT: I didn't understand. All right.

wc 2

Then this is a deposition of an employee of the defendant, and the plaintiff's counsel has taken his deposition, that is, his testimony before trial under oath, and he is permitted under the rules to read that testimony to you, because it is an agent of an adverse party.

MR. FISCHER: Thank you, your Honor. I will read the page number and the line before I read the transcript.

At page 4, commencing at line 8, these are a series of questions, and I will read the question first, the question that I asked of the witness, and then the answer that the witness gave under oath.

"Q Please state your full name and address for the record.

"A Aldo De Mattei; 27-08 39th Avenue, Long Island City, New York 11101.

"Q By whom are you employed, Mr. De Mattei?

"A Dic-Underhill.

"Q Were you employed by Dic-Underhill in August, 1973?

"A Yes. I'm not too sure of the date, but I was there."

Line 20.

"Q Were you similarly employed on August 16, 1973

wc 3

by Dic-Underhill?

"A Yes.

"Q Were you working on a specific job for Dic-Underhill?

"A I was the compressor engineer at the time."

Page 5.

"Q Where did you spend your time, your workday, on August 16?

"A By the machines on the job site.

"Q At the Port Authority?

"A At the Port Authority.

"Q We are talking about the construction of the World Trade Center?

"A That's right."

Page 5, line 15.

"Q During that week of August 16th, what day of the week was it, do you recall?

"A It should have been a Wednesday.

"Q Sometime in the middle of the week?

"A Yes.

"Q During that week did you spend your time working at the World Trade Center?

"A Yes.

"Q What were your working hours?

wc 4

"A At that time, seven in the morning to 4:30."

Page 6, line 20.

"Q One of the two machines that Dic-Underhill had at the job was rented from Gardner-Denver; is that correct?

"A Yes.

"Q When was the last time you saw that machine?

"A The night prior to the night it was missing. Dates I don't remember.

"Q When you say 'the night prior,' you mean at 4:30?

"A At 4:30 when I quit. I turned the machines off and I left and I went home."

Page 9, line 11.

"Q When it was brought to the site and placed in position, was it in any way affixed to the ground or to any structure located there?

"A No.

"Q It only rested on its own weight?

"A It rested on its wheels.

"Q How many wheels?

"A Four.

"Q Was it chained in place?

"A No.

"Q Locked in place?

"A No."

Page 11, line 22.

"Q Have you ever seen compressors with their wheels removed to keep them in place?

"A Yes.

"Q Were the wheels removed from these compressors?

"A No."

Page 14.

"Q Let us discuss the compressor rented from Gardner-Denver. When did that arrive on the job site?

"A A week or eight days prior to the day they were repoted missing.

"Q A week to eight days?

"A Somewhere around there.

"Q Prior to August 16th?

"A I'm not too sure. I can't recall that far back.

"Q When it arrived at the job site, was it placed in the position where it remained until August 16th?

"A No.

"Q Where was it brought to?

"A Now I have to think. The first two machines came in. I believe they were -- I think they were on Liberty and West Street.

"Q When they first came in?

"A Yes.

"Q How long did they stay at Liberty and West Street?

"A A day or two, I believe.

"Q Then what happened?

"A Then they moved it to this site on Greenwich and Cortlandt or Greenwich and Church.

"Q And it stayed at Greenwich and Church for about five or six days until it was stolen?

"A Right.

"Q During that five- and six-day period, it was basically the same spot that you have just described?

"A Yes."

Then there is a question and an objection, and line 13, the next question:

"Q During that five- or six-day period, were the wheels removed?

"A No."

Page 19.

"Q What did you do next?"

And this relates to after he discovered the machines were missing.

"A I went over and told my immediate supervisor --

"Q Whose name was what?

wc 7 "De Mattei

"A Artie Lamar.

"(Continuing) -- that the compressors weren't on the site. From then on, I don't know what action was taken."

Page 20, line 3.

"Q Did you ever learn whether or not the compressors were stolen?

"A Oh, I don't know.

"Q You do not know whether you learned that?

"A I didn't inquire. All I know is I heard the machines were stolen.

"Q Who told you?

"A The word got around.

"Q That the two compressors were stolen?

"A They didn't say stolen. They just said that the two compressors were missing.

"Q When you heard that, did you hear whether anything else was missing?

"A No.

"Q To your knowledge, you know of nothing else that was stolen at or about that time?

"A No. I am not interested in anything. This is my job, to maintain my machines. I am not interested in what is missing, what's not missing. I go in and maintain my machines. My machines weren't there. I couldn't maintain

wc 8 "De Mattei

my machines. Naturally, I inquired whether they moved their machines. When they told me they didn't move them, I went a little further and remarked that the machines were not on the job site."

Page 22, line 6.

"Q Is there any other way one can affix the compressors to a given spot, that is, make it difficult to remove other than removing the tires?

"A Sure. You could let the air out of the tires. You could bolt it to the ground. You could take the wheels off.

"Q How would one bolt it to the ground?

"A You would put a leg screw in and bolt it."

Page 24, line 4.

"Q Did anyone ever speak to you about securing those compressors in place?

"A No."

Page 28, line 5.

"Q What efforts were made by Dic-Underhill to secure the compressors from theft?

"A I don't know. I mean, when you say 'security,' what do you want to do, put a watchman there all night? I don't know. Maybe he did have a watchman.

"At 4:30 I went home. What happened after 4:30,

wc 8A "De Mattei

I don't know. I went home."

That concludes the portions that we would like to read into the record.

* * *

wc 1 Philip - direct

S I D N E Y P H I L I P, called as a witness by the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LITTAU:

Q Mr. Philip, by whom are you employed?

A Dic-Underhill, a joint venture.

Q Could you tell us what entities compose this joint venture of Dic-Underhill?

A The two companies, Dic Concrete Corporation and Underhill Construction Corporation, formed a partnership to do this World Trade Center work, under the joint venture -- a joint venture agreement, calling itself Dic-Underhill, a joint venture.

Q Does Dic-Underhill have a written contract with the Port Authority for the performance of certain work at the World Trade Center?

A It has.

Q Could you identify that contract by number, sir?

A There are several contracts. One is Contract 117.00; 117.00SA1; 130.011.

Q Could you give us and the jury a short, concise history of the job that Dic-Underhill did at the World Trade Center starting from approximately the date it commenced

wc 2 Philip - direct

operations, up including August 15-16, 1973?

A The original contract, 117.00, involved --

MR. FISCHER: Objection, your Honor. I think the witness is about to testify what the contract required him to do, and I don't see the relevance of the contract to this case.

THE COURT: Objection sustained.

MR. LITTAU: I believe that the witness' experience with the operations at the job site are entirely relevant to the considerations as to the case that plaintiff must prove, your Honor.

THE COURT: What relevance? The issue here is whether the defendant was negligent with respect to the keeping of this compressor.

MR. LITTAU: Exactly so, your Honor. I am not planning to --

THE COURT: What the defendant was to do generally on the World Trade Center site is not relevant to that issue of negligence with respect to machine.

MR. LITTAU: I believe it is, your Honor.

THE COURT: I just ruled it is not. I don't want to hear that, what he is supposed to do generally. The only thing this jury is to concern itself with is whether the defendant Dic-Underhill was negligent with respect to this

particular piece of equipment which everybody agrees was stolen.

Is that right?

MR. LITTAU: That is right, your Honor.

THE COURT: All right.

Q Did Dic-Underhill have any other heavy equipment at the site of the World Trade Center, other than the two compressors that were stolen on the night of August 15 through 16, 1973?

A Yes. We had several cherrypickers, which are rubber-tired cranes which are used for hoisting items like reinforcing steel or concrete carts, buggies.

Q Are they self-propelled, sir?

A Self-propelled. We had several trucks on the job, rubber-tired automobile trucks. We had several rubber-tired cranes on the job at different intervals.

Q Were the cranes self-propelled, sir?

A Yes.

Q Beginning approximately when was heavy equipment like this used on the site of the World Trade Center?

THE COURT: By his company?

Q By this company.

A In January of 1969.

Q Do you have any recollection as to what type of

equipment came in then, sir?

A There were trucks, shortly thereafter there were compressors, and a cherrypicker.

Q Was the first compressor in connection with your work brought in by Dic-Underhill itself?

A No.

Q Who brought it in, sir?

A A subcontractor we had called, L & J Contracting Company.

Q Was L & J a subcontract under this particular Contract 117 under which you were working?

A He was our subcontractor under that contract, yes.

Q What is your title with the Dic-Underhill group?

A Contract manager.

Q Are you an officer of either corporation?

A I have the title of vice president of Underhill Construction Company.

Q I would like to ask you, sir, how long you have been engaged in heavy construction?

A Some almost forty years.

Q Have you been with the Underhill Construction Company or Dic-Underhill all this time, sir?

A No, sir.

wc 5 Philip - direct

Q Who did you work for before? Let us take the last previous one.

A Del Balso Construction Company.

Q Did you work in this general area of New York City?

A Yes.

Q With Del Balso.

A Yes.

Q Who else, sir?

A The Caldwell Wingate Company.

Q And, again, did you work in this general New York City area with them?

A No. Out of town.

Q Far out of town, sir?

A Well, from Hartford down to North Carolina.

Q In your work for any other of these companies, and including the time you were with Dic-Underhill, which as you said is now a total of about forty years -- is that right, sir?

A Yes.

Q -- have you ever experienced on any job the theft of a major piece of heavy construction equipment?

A I can't think of a single item of near-comparable size.

wc 6 Philip - direct

Q Let us take particularly the job at the World Trade Center, sir. When did Dic-Underhill start its operations? I think you said in 1969?

A Well, I appeared on the job on December 3, 1968, and we were organizing then. Shortly thereafter we had men on the job. So basically I use January 1, 1969.

Q From the period January 1, 1969, to the date August 15, 1973, did Dic-Underhill experience the disappearance of any major piece of construction equipment at that site?

MR. FISCHER: I object unless we define what he means by "major."

Q I will define it as meaning the major equipment Mr. Philip has already testified to: trucks, so-called cherrypicker cranes, rubber-tired mobile cranes, and whatever.

MR. FISCHER: Fine.

THE COURT: All right.

A No, sir.

Q How many people did Dic-Underhill have working for it at the World Trade Center site as a maximum number at any time?

A Approximately 1500.

Q Do you know a man named Lamar?

A Yes, sir.

Q What was his position, sir?

A He was a field engineer, assistant superintendent

Q Was there a superintendent above Lamar?

A Yes, sir.

Q Who was that, sir?

A They had several on different occasions. There was Nicholas Fasino, Donald DaPollo -- Dennis DaPollo. But Mr. Lamar was always an assistant superintendent.

Q I would like to show you a copy of Plaintiff's Exhibit No. 2, which is an order form on the form of Compressor and Rock Service Division of Gardner-Denver, Plaintiff's Exhibit 2, and direct your attention to a signature that appears in the bottom left-hand corner.

Do you know if that is Lamar's signature, sir?

A It appears to be Lamar's signature.

Q Is Mr. Lamar authorized to acknowledge the receipt of various materials and equipment?

MR. FISCHER: Objection. I don't know what the relevance of this is.

MR. LITTAU: The relevance of this goes directly, your Honor, to the sentences that the gentleman read from the bottom paragraph of the back side of this particular form.

MR. FISCHER: OK, he can answer. I withdraw the

objection.

THE COURT: The question to the witness is whether Lamar was authorized to receipt large equipment for Underhill, Dic-Underhill.

Q Was he authorized to sign for tne receipt, to acknowledge receipt of large equipment?

A Yes, he was.

Q Was Lamar authorized to agree to any rental terms or conditions in connection with any such equipment?

A No, sir.

Q Do you know, Mr. Philip, the pictures that were previously marked in evidence, especially Exhibit E, which has a mark on the front, do you know whether that indicates the approximate location of the compressors just prior to their disappearance on the night of August 15-16, 1973?

A That's the general area. I would place it a litt bit further north of it, but generally speaking that is it within the site.

Q Are you familiar with what seems to be a fence that appears both at the front left-hand portion of the picture and at the rear of the picture, just apparently in front of a cherrypicker that is in the street?

A I am familiar with that fence, yes.

Q Did that fence run around the two sides of the

wc 9 Philip - direct

area at least, that are shown in this photograph?

A Yes, it did.

THE COURT: At what time?

MR. LITTAU: At August 15-16, 1973.

A Yes, sir.

Q Did Dic-Underhill ever employ its own private security guards on this job?

A No, sir.

Q Did Dic-Underhill, or either Dic or Underhill, ever employ private security job guards on any job with which you are familiar?

MR. FISCHER: Objection.

THE COURT: Pardon me?

MR. FISCHER: Objection.

THE COURT: What is the objection?

MR. FISCHER: Well, whether or not they employed guards at other job sites and other situations is not relevant to what they did in this particular situation.

THE COURT: Overruled.

Read the question, please.

(Question read)

A No, sir, they did not.

Q And we are talking, of course, about the general New York City Metropolitan Area.

A That's correct.

Q Were police officers ever available and patrolling any other job with which you are familiar that Dic-Underhill did?

A Not patrolling per se. The occasional New York City policeman on patrol would pass by, but not a specific patrol.

Q Mr. Philip, with respect to the two compressors that disappeared, were they in any way interconnected prior to the disappearance?

A Yes. They were pipe-connected.

Q What do you mean by that, sir?

A A bull hose, which is about -- it is a flexible hose but very heavy, to take the pressure of the air coming out, and it's about 4, 4 1/2 inches in diameter, with maybe an orifice of about 2 inches or 2 1/2 inches, connecting the machine to a cylinder, a header, a receiver, not the header, but this is a receiving tank, so that the compressed air would go into the tank and in a sense stored there before it is sent out to the various compressor-operated guns. That is in order to give them an equal balance pressure rather than the impact of the machine. But they were hooked to this receiving drum.

Q Was it physically necessary to unhook the

compressors from such a drum to move them?

A Yes. For a large size Stillson wrench, there is a nut about 6 inches in diameter.

Q You would use a Stillson, one that draws at least 6 inches across?

A Approximately that, that's right.

Q Let us focus on the one compressor that was rented from Gardner-Denver. Do you recall whether that was at that position,that it was on the night of the disappearance, from the time it first came on the job, perhaps the week before?

A I don't know exactly what other position it was in, but I know we constantly -- we had to constantly move the compressors, because we were constantly in the way of a new operation, new phase of the construction. So that we had twenty, thirty, forty locations where these compressors would move to. This particular one location was a relatively new location on Greenwich Street inside the fenced area.

Q Did you sometimes get short notice to move a compressor?

A Well, a day.

Q There was a compressor that was rented starting in 1969 by L & J, which was rented by it to Gardner-Denver, wasn't there, sir?

A That's right.

Q Was that a 1200 cubic foot per minute compressor?

A Yes.

Q Did Dic-Underhill later start paying the rental directly to Gardner-Denver?

A Yes, we did.

Q Did Dic-Underhill thereafter purchase that compressor?

A We did.

Q Did that compressor remain on the job site continuously from 1969 to 1973?

A Yes, sir.

Q Is it back on the job site now, sir?

A Yes, sir.

Q Do you know where and when it appeared after the night of the disappearance?

A It was reported to me that somebody had seen it in some riverfront location in Williamsburgh. I don't know exactly where.

Q And was it thereafter brought back to the site?

A It was brought back.

Q Do you recall how the compressor owned by Gardner-Denver and leased to Dic-Underhill arrived at the World Trade Center job site in August 1973?

A I didn't see it come in. The usual delivery is on the trailer.

MR. FISCHER: Objection. Withdrawn.

Q Did you have any staff reports -- I beg your pardon?

THE COURT: The objection is withdrawn.

MR. FISCHER: Objection withdrawn. The answer is on the record.

THE COURT: Objection is withdrawn. He said he did not see it come in.

Q Did you ever have any direct conversations with anyone from Gardner-Denver, such as Mr. Wollerman or Mr. Zaretti, or anyone else that you can think of, after the disappearance, to the effect that if they sent in an invoice for some $29,000, anything to the effect of it would be taken care of?

A No, sir.

Q You have a gentleman in your office named Bill Peters or William Peters?

A Yes, sir.

Q What is his title?

A Office manager.

Q Does his authority as office manager extend to purchasing equipment of the approximate sum of $29,000?

A No.

Q In all the time that you have been in heavy construction -- let us take the World Trade Center job first, the Dic-Underhill group -- have you ever seen disabling precautions taken with heavy equipment, such as this 1200 cubic foot per minute compressor that disappeared?

Now, let me be precise as to the disabling features: whether the tires were removed, whether the tires were deflated, whether tow bars were physically removed, whether tow bars were chained to parts of a building and padlocked.

Have you ever seen anything like that?

A Can I have the beginning of the question?

THE COURT: Read the question, please.

(Question read)

A Subsequent to the theft, we did remove tires from compressors.

Q We are talking about up to August 15, 1973, sir.

A No, sir.

Q How about your activities with Del Balso? On those jobs did you ever see a heavy compressor "disabled" for this purpose?

A No, sir.

Q Caldwell Wingate?

A No, sir.

MR. LITTAU: May I have a moment, if your Honor please?

THE COURT: Yes.

(Pause)

Q Mr. Philip, do you know whether there were any guard-type personnel, other than Port Authority uniformed police, present at the World Trade Center site?

A Yes, sir, there were.

Q Do you know who supplied such guards?

A I understand it is the Mandel Agency.

MR. FISCHER: Objection; move to strike his testimony, unless he states the basis of his knowledge, which I believe is hearsay.

THE COURT: Yes. You can only testify to what you know of your own knowledge. The question to the witness first was whether guards stationed at the World Trade Center site, security guards --

MR. LITTAU: Yes, your Honor.

THE COURT: Do you know that of your own knowledge, that there were guards stationed there?

THE WITNESS: Yes.

THE COURT: What is the next question?

Q Do you know whether the Port Authority paid for

those guards, sir?

A I have no idea.

Q Did Dic-Underhill rely upon the presence of those guards as an aid in the security of the job site and its equipment?

A Yes, we did.

MR. LITTAU: Thank you.

THE COURT: All right, we are going to recess in this case until 10 o'clock tomorrow morning.

(Pause)

THE COURT: No, we are going to change that to 11:30 tomorrow morning. Recess in this case until 11:30 o'clock tomorrow morning. The jury is excused. The witness is excused until 11:30 tomorrow morning.

Excuse me, just before teh jury goes, will counsel approach the bench, please?

You may be seated just a moment.

(At the side bar)

THE COURT: How many more witnesses do you have? I would like some idea of when we might get through.

MR. LITTAU: I am going to put on Rambousek.

THE COURT: Pardon me?

MR. LITTAU: Lt. Rambousek. Hopefully that should not take more than an hour, with cross-examination,

I hope. And I have an expert on valuation. I hope that will be a short one. I honestly don't know if I need Mr. Petagna or not. His examination before trial was taken. I probably don't need him.

THE COURT: He is an auditor?

MR. LITTAU: He was a Port Authority auditor. His deposition was taken as a witness. I probably don't need him in any way, shape or form. So I would guess 90 percent is just going to be Lt. Rambousek and Mr. Land, who is our expert on machinery.

THE COURT: So Rambousek is the policeman who was there who made the investigation?

MR. LITTAU: Yes, your Honor.

THE COURT: Do you have any other witnesses?

MR. FISCHER: Possibly rebuttal by Mr. Wollerman, but that is it. That will be ten minutes.

THE COURT: Then I guess we get to the jury tomorrow. Because I want to tell them they might be here late.

MR. FISCHER: Are we going in the afternoon tomorrow?

THE COURT: Yes, tomorrow. That is what I wanted to say.

MR. LITTAU: The other thing, your Honor, is I

have five minutes at most to read out of a deposition.

(In open court)

THE COURT: Ladies and gentlemen, when we begin at 11:30 we are going through the afternoon, because it appears that the case may end tomorrow, and the case will be submitted to you for your deliberation. So we will be here until about 5:30 at least tomorrow afternoon. We will continue the next morning, that kind of thing. But I wanted you to know that we will be working tomorrow afternoon in this case.

You are excused now until 11:30 tomorrow.

(The jur left the courtroom.)

THE COURT: Gentlemen, for your own guidance, I don't plan to keep the jury behond 5:30 tomorrow. It should go out early tomorrow afternoon, but we won't go beyond 5:30.

Thank you, gentlemen.

(An adjournment was taken to October 7, 1976, at 11:30 a.m.)

wc 19 Philip - cross

Gardner-Denver Company

v.

Dic-Underhill Construction Company

New York, N. Y.
October 7, 1976 - 11:30 a.m.

THE COURT: Bring in the jury.

(Jury present)

THE COURT: Good morning, ladies and gentlemen.

You may proceed.

S I D N E Y P H I L I P, resumed.

CROSS-EXAMINATION

BY MR. FISCHER:

Q Mr. Philip, did you testify on direct that you are contracts manager of Dic-Underhill?

A That's right.

Q And you are also a vice president of that company?

A Of Underhill Construction.

Q Of Underhill Construction Company. What position did you hold with the defendant Dic-Underhill in 1973, in about August 1973?

A The same position, contracts manager.

Q Are you a compressor engineer?

A No, sir.

Q In August --

A I am a professional engineer.

Q In August 1973 where did you work, what location?

A Are you speaking of me?

Q You. You yourself.

A My office was in on the 21st floor of Building 2, World Trade Center.

Q So you worked out of that office?

A That's right.

Q What were your duties in August 1973?

A The general coordination of the construction operations at the site.

Q And you functioned out of that office?

A That's correct.

Q Did you perform any work in the field on the compressors?

A No, sir.

Q You testified that the compressors that Dic-Underhill had in its possession in August 1973 from time to time would move from place to place; is that correct?

A Yes, sir.

Q Now let us talk about the compressor that was stolen. Mr. Mattei, Aldo DeMattei, was he your compressor engineer at that time?

A Yes, sir.

wc 21 Philip - cross

Q And was he in charge of the compressors?

A Yes.

Q On his deposition he said that the compressor that was stolen was standing in the same place for five or six days. Do you have any reason to believe that is not true?

A No reason to believe it is not true.

Q So the compressor was standing in place for five or six days, and the one wheel was not removed to prevent it from being stolen. Is that correct?

A That's correct.

Q But I think you also testified yesterday that after this compressor was stolen, that from then on, Dic-Underhill removed the tires from the --

MR. LITTAU: Your Honor, I must object.

Q -- from the compressor.

THE COURT: Let him finish the question, please; then you can object.

Q That after the theft, Dic-Underhill removed tires from their compressors; is that correct?

THE COURT: Just a minute. Don't ask him to answer. There is an objection.

MR. LITTAU: There is an objection, your Honor, as completely irrelevant to what happened before.

THE COURT: Yes. The issue for the jury is whether at the time this compressor was stolen the defendant acted with reasonable care under the circumstances, not what happened after, but whether at the time of the theft here the defendant was acting as a reasonable person should act with respect to protecting it from being stolen.

All right, let us proceed.

MR. FISCHER: Your Honor, yesterday the witness testified to what I --

THE COURT: Yes, he did, but I am telling you now there is an objection, and this jury is not to consider what happened after the theft but what happened at the time.

MR. FISCHER: Thank you.

Q At the time and up to August 1973, the compressors that were on the site at Dic-Underhill, the one that was stolen, that didn't have the tire removed; is that correct?

A That's correct.

Q And it did not have a tire deflated while it was standing in place for the five or six days, is that correct?

A That's correct.

Q And the tow bar was not affixed to the ground or

wc 23 Philip - cross

chained to a fence, is that correct?

A That's correct.

Q Or chained to anything, is that correct?

A That's correct.

Q Is it not also a fact that the entire construction area at the World Trade Center was not circled by a fence in its entire area?

THE COURT: At that time?

Q At that time?

A You are speaking of the entire area or the area --

THE COURT: The area where the machinery was located.

A That was enclosed by a fence or a building.

Q Were there any ways to go around the fence at the construction site at that time?

A There were gates in the fence.

Q What area do you say was then fenced?

A Along Liberty Street, which is the southerly portion of the site, Church Street which is the easterly portion of the site, and a piece along the northerly portion, which is Dye Street, was fenced.

Q How about the southern portion?

A That was building 2 or building B.

wc 24 Philip - cross

Q I show you what has been marked as Defendants' Exhibit D and ask you where were the fences located?

A The southerly fence -- Liberty Street is here. The easterly fence is shown here.

Q What was on the foreground side of the picture, that is, on our foreground?

A The tower, building 2.

Q And was that accessible from the street? Can someone walk in from that building and go to the site?

A From the building, yes, you could walk from the building onto it.

Q How about from around the building? Could someone go around the building and into the site?

A You could go around the building, walk around the building. You couldn't drive because this is an elevated portion.

MR. FISCHER: I move to strike the answer.

MR. LITTAU: Wait.

THE COURT: Just a moment.

MR. FISCHER: I move to strike the answer. I asked if someone could walk around.

THE COURT: Read the question and answer, please.

(Question and answer read)

THE COURT: What do you want to strike?

wc 25 Philip - cross

MR. FISCHER: I move to strike the portion where he testified you could drive. I asked him could someone walk around the building.

THE COURT: You did not say "walk."

MR. FISCHER: I will amend the question.

THE COURT: The answer is not stricken. It is responsive to whether someone could get into the site.

Q Could someone walk into the site?

A Yes.

Q Without a fence obstructing him, is that correct?

A Yes.

Q On deposition of Patrolman Rambousek, at page 14 of his deposition, he was asked the following question and gave the following answer:

"Q Your predecessor witness testified that a fence surrounded the entire area in which the compressors were located.

"A To the best of my knowledge, I couldn't say that."

Did a fence surround the entire area where the compressors were located or didn't it?

THE COURT: Just a moment.

MR. LITTAU: There is an objection, your Honor. I think the question has been asked and answered, and I think it is improperly asked in this manner.

wc 26 Philip - cross

THE COURT: Yes. Whose testimony is that?

MR. FISCHER: Patrolman Rambousek.

MR. LITTAU: No, your Honor, he was referring back to Mattei.

MR. FISCHER: DeMattei is the employee of Dic-Underhill, who said he believed the entire fence surrounded the area. I asked the same question of the patrolman, and he gave the response which I read. I am asking whether that in any way refreshes the witness' recollection as to whether or not a fence surrounded the entire area.

THE COURT: Well, you have changed it now to refresh his recollection. I was about to point out that you apparently were using somebody else's testimony to impeach the credibility of this witness.

MR. FISCHER: No.

THE COURT: Which cannot be done.

Does that refresh your recollection as to whether there was a fence?

At what point?

Q In August 1973, around the entire area.

A My recollection is quite distinct. There was a fence as I described previously.

Q In which area?

wc 27 Philip - cross

A Along Liberty Street on the south side, along Church Street on the east side, and along Dye Street on the north side. The remaining side did not have a fence; it had a building occupying the space.

Q In August 1973 you testified to a lot of heavy equipment that Dic-Underhill had at the site. Is that correct?

A I did.

Q Cherrypickers, trucks, compressors, and the like. That is pretty expensive equipment, isn't it?

A Yes.

Q Did Dic-Underhill employ a night watchman to watch its equipment?

A No.

Q So after 4:30 the Dic-Underhill laborers, personnel, would leave the site and there would be no night watchman to watch the equipment; is that correct?

A That's correct.

Q And no Dic-Underhill employees to watch the equipment left after 4:30, is that correct?

A Sir, I have a little bit of confusion. You posed, the first part of this question -- there were employees there watching, presumably watching equipment. Not our employees.

OFFICIAL DISTRICT COURT REPORTERS U.S. COURTHOUSE

Q I am talking about Dic-Underhill employees.

THE COURT: No, no, just a moment. He is also talking about after 4:30, the end of the workday.

Is that your question?

Q After the workday, were any Dic-Underhill employees at the site to watch the equipment?

A No, sir.

Q You were asked questions on direct examination about Mr. Lamar?

A Lamar.

Q Lamar. His name appears apparently on the exhibit, Plaintiff's Exhibit 2, the order and the signature acknowledging receipt, apparently.

What was his position with Dic-Underhill?

A Engineer. Assistant superintendent. That's field engineer.

Q Did you ever tell the plaintiff or Gardner-Denver that he was not authorized to accept equipment and sign for it?

A No, sir.

Q In 1973, after the theft of this compressor, did Gardner-Denver send you a bill or an invoice? By "you," I mean Dic-Underhill.

A Yes.

wc 29 Philip - cross

Q And was that in the amount of $29,000?

A Yes.

Q Did you in 1973 tell Gardner-Denver that you were not going to pay that $29,000?

A No.

Q Did you tell him that in 1974?

A No.

Q You also testified on direct examination that there were two compressors and that they were somehow connected to each other; is that correct?

A Yes.

Q Isn't it a fact that to unconnect or disconnect the two compressors, one would take a wrench and unscrew the bolt? Isn't that a way to disconnect the two compressors?

A A wrench is required to disconnect the hose from the receiving tank.

Q So if someone walked up to the two compressors and had a wrench, he could just turn the screw or the bolt and unscrew the two compressors?

A A big-enough wrench, yes.

Q Prior to August 1973 did Dic-Underhill experience any thefts at the World Trade Center?

A Yes.

Q You did?

A Yes.

Q What type of things were stolen?

A Hand tools, skill saws, hammers, shovels.

Q Is this common in the construction industry?

A Yes.

Q And were any precautions invoked to prevent those thefts?

A Well, we would replace the locks which were broken on weekends. We locked the shanties, put the tools in shanties and locked them. Those were our precautions.

MR. FISCHER: I have no further questions.

REDIRECT EXAMINATION

BY MR. LITTAU:

Q Mr. Philip, Gardner-Denver's attorney asked you about your particular job or function insofar as Dic-Underhill was involved at the World Trade Center. I believe you mentioned something about coordination of the work. Could you tell us just a little more about what that entailed?

A Well, we had three contracts there which involved the employment of anywhere from 800 to 1500 men at different times, pouring concrete in two towers for some 110 stories in each building. Each floor covers an acre. And then the

lower ground level is approximately ten acres, and that has seven decks of concrete on it.

In addition to that, there is an additional building on Vesey Street and Liberty Street, a ten-story building. And the paving and waterproofing around the whole site, that is, the promenade level, which is high above the river, which matches the street level at Church Street. And my job was the coordination of our particular phase, which was primarily concrete work, together with the various other trades that were engaged at the site, that is, the plumbing and the heating and the electrical and the miscellaneous iron and the plastering and the masonry and so forth. Mine was that of coordination and to see that our work would dovetail with them and not inhibit their operation.

Q Thank you, sir. And you were the boss insofar as Dic-Underhill was concerned?

A Yes.

Q Who was Aldo DeMattei? Is he a permanent Dic-Underhill employee?

A No.

Q How did he come to Dic-Underhill?

A Well, when we bring a compressor on the job, we call the union hall, and they send an operating engineer to

wc 32 Philip - redirect

turn the machine on, fuel the machine, turn the machine off at night, and that by union regulation is his job.

Q And that is how DeMattei came?

A That's right.

Q I would like to show you two pictures, Mr. Philip.

MR. LITTAU: May they be marked for identification, please?

(Defendants' Exhibits G and H marked for identification.)

xx

Q Mr. Philip, can you look at those two photographs and say whether they are fair and accurate representations of the southeast corner of the World Trade Center site, which was location of the compressors that were stolen, as it generally appeared at the date of the theft, at or about the date of the theft, with particular reference, sir, to what appeared to be interior roads or paths and the perimeter?

A Yes, sir.

Q They are fair and accurate representations?

A That's correct.

MR. LITTAU: I offer them in evidence, then.

THE COURT: Any objection?

MR. FISCHER: No objection.

wc 33 Philip - redirect

THE COURT: Received.

(Defendants' Exhibits G and H received in evidence.)

xxx

Q Mr. Philip, could you indicate by a C on each of the --

MR. LITTAU: Mr. Clerk, may we have a marking pen, sir, for the witness?

(Handed to the witness)

Q Could you indicate by C's the location of the compressors as of the date of the mysterious disappearance.

A (Complies)

Q Mr. Philip, could you indicate by the use of, say, the letter G the gate you mentioned which was on Church Street, and did you mention a gate location on Liberty Street as well?

A Yes.

Q So could you make one GC for gate at Church and GL for gate at Liberty, please.

A (Complies)

Q Mr. Philip, did you testify on cross-examination that there was a fence along the outside perimeter of the construction site in this area?

A Yes.

Q Could you, by the letter F in several places,

wo 34 Phi.ip - redirect

indicate the run of the fence?

A (Complies)

Q Thank you, sir. Now, the two what appear to be streets which lead from the line of the fence at right angles into the location of the compressors, were those streets in public use, sir?

A No, sir.

Q Were they used for construction activities, sir?

A Yes.

Q Off toward the right of the picture there is a building. Is that tower 2 or tower B, sir?

A Yes. The first building is tower 2. Tower B.

Q The first building is tower 2. Does the land lie flat and horizontal there, sir? Or does it slope?

A Generally the trend of the ground is sloped toward the river.

Q Sloped downward toward the river?

A Toward Church Street downward toward the river.

Q So that if one went completely parallel, I mean, completely flat from the line of Church Street on the east over toward the Hudson River, could one get off the site without a fall, as of 1973, or were there structures built?

MR. FISCHER: I would like to note my objection,

your Honor. This is beyond the scope of cross-examination, going into new areas.

THE COURT: Yes. Distinctly leading the witness and far beyond the scope.

MR. LITTAU: All right, your Honor.

Q Thank you, Mr. Philip.

A I have been marking this with a black pen.

THE COURT: Maybe you should pick up.

THE WITNESS: The marking pen I have is black. The marking pen I have marked with is black and it is not very clear as to what I marked. If I could have a red one, I would like to re-mark.

(Red pen handed to the witness)

MR. LITTAU: Will Mr. Fischer allow me to ask one more question?

MR. FISCHER: Surely.

THE COURT: Are you through with this witness?

MR. LITTAU: If he is finished marking, your Honor:

Q Is Mr. DeMattei presently employed by Dic-Underhill?

A No, sir.

Q Did you or to your knowledge anyone on behalf of Dic-Underhill ever state to the plaintiff Gardner-Denver

that Dic-Underhill group would pay them $29,000 for the stolen compressor?

A Not to my knowledge.

MR. LITTAU: Thank you.

RECROSS-EXAMINATION

BY MR. FISCHER:

Q Can I see where you marked on these exhibits your notations?

A These F marks would indicate the fence starts here and the F goes here to here to here. The gate at Liberty is here, the gate at Church is here, and the first letter C, the compressor, is here.

Q I will take one and you hold on, on Exhibit G. Is it fair to say that the compressors were located prior to the theft at Greenwich and Cortlandt Streets?

A That's correct.

Q Could you tell me where that would be on these pictures?

A Let's see, I don't know how we are going to mark it plainly. It's there.

Q All right. A big round red spot.

Now, the police report that is Plaintiff's Exhibit 5 made at or about shortly after the theft says that the area at Greenwich and Cortlandt Streets, where

you have pinpointed the compressors to have been, is an open construction area; is that correct?

A That's right.

Q Was there an open construction area?

A That's right.

Q And the police report further says that the entire area of Greenwich and Cortlandt Street is unsecured. Was that correct at the time?

MR. LITTAU: May I object to that, your Honor. This is interpretation of what the report says. It is there in black and white as to what it says, and I must note that I disagree strongly with the interpretation that is put on it here.

We argued about this the other day, on the admissibility question, your Honor.

THE COURT: Again, what you are doing is using somebody else's statement to impeach the credibility of this witness. The jury is to determine the credibility of each witness separately.

Now, you can use any prior inconsistent statement that this witness may have made out of court in his deposition, but you cannot use somebody else's statement and then try to impeach him with that. Do you understand?

MR. FISCHER: I will ask a separate and independent

question.

Q Was the entire area of Greenwich and Cortlandt Street where the compressor was located unsecured?

A Unsecured? There was a gate as far as road access is concerned. Pedestrians could walk through, but there was a gate across the road.

Q So pedestrians --

A And sometimes replaced with a chain.

Q So pedestrians could walk in and out?

A Right.

Q Is that correct?

A That's correct.

Q And approach the compressors?

A Correct.

Q And unscrew the two compressors that were connected to each other?

A It's possible.

Q There was nothing to prevent them from walking in and doing that, was there?

A Nothing, physically.

MR. FISCHER: I have no further questions.

THE COURT: Anything further?

MR. LITTAU: No.

THE COURT: Thank you. You may come down.

(Witness excused)

wc 39 "De Mattei"

THE COURT: Next witness.

MR. LITTAU: Your Honor, at this time I should like to read about half a dozen questions and answers from the transcript of the testimony of Mr. DeMattei, which will serve to amplify, I hope, the questions and answers from this deposition that were read --

THE COURT: Just read them without comment, please. You have the right to read anything you want from the deposition read from by the plaintiff.

MR. LITTAU: Thank you, your Honor.

THE COURT: What page?

MR. LITTAU: On page 9, your Honor, starting at line 19, Mr. Fischer read the following two questions and answers:

"Q WAs it chained in place?

"A No.

"Q Locked in place?

"A No.

"Q Was it fenced in?

"A There was a fence all around the job site."

Page 12, your Honor.

On page 11, line 22, Mr. Fischer read in the following questions:

"Q Have you ever seen compressors with their wheels

wc 40 "De Mattei"

removed to keep them in place?

"A Yes.

"Q Were the wheels removed from these compressors?

"A No."

Then:

"Q Why?

"A Because we didn't know how long those machines were going to be at that particular site. It could be there two weeks, two days. It could be there one day and go to another site."

On page 13, your Honor, line 11:

"Q It would take some effort" -- referring to jacking up and removing a wheel -- "It would take some effort; is that what you are saying?

"A I wouldn't say it is an effort if you had the men to do it. The same as chaining a wheel on a car. The only thing is it is a little larger.

"Q Did you ever do that type of work?

"A No. I have nothing to do with that part.

"Q Have you ever seen a compressor on a Dic-Underhill site where the wheels were removed?

"A No."

On page 22, line 12, the question which was read:

wc 41 "De Mattei"

"Q How would one bolt it to the ground?

"A You would put a leg screw in and bolt it."

Following that, line 14:

"Q None were employed in this situation?

"A I don't see any reason.

"Q To prevent it from being stolen.

"A Then what do you do when you have to move it?

"Q Unsecure it the next morning.

"A Then you have to pay for all that labor."

Comment by counsel. Witness continued:

"THE WITNESS: I'll tell you one thing. The way we put them in, we put them with a tow bar facing an excavation so you couldn't back into them with a truck.

"Q With the tow bar facing the excavation?

"A Right, a deep excavation.

"Q Could they be turned around on their wheels?

"A Sure, if you wanted to snake them out. But you just couldn't back into them.

"Q How would one remove them, then?

"A I have no idea.

"Q It would take a little doing; is that correct?

"A I don't know. I never moved the compressor.

"Q What do you mean you would have to snake them out?

"A You would have to move them out to get to the bar."

wc 42 "De Mattei"

Now, page 30, line 8:

"Q Did you have an opportunity at that time or after that time to see the entire fencing around the entire work site? Did you actually see the whole fence?

"A Yes, because where the compressors were, I looked out on Church Street, and that's where the fence was.

"Q There was a fence on Church Street, and where was the other fence?

"A It ran from Liberty Street.

"Q There was a gate on Church Street. And where was the other gate?

"A The other gate was down on Greenwich and Liberty.

"Q Were they both about the same construction, both gates?

"A They were large gates where you could get trucks in."

The next page, 31, line 4:

"Q Did you see a lock on the gates?

"A Yes, there was a lock and chain on them."

On line 16 of page 31:

"Q Do you know whether or not Dic-Underhill employed the security?

"A I wouldn't know. I know there was security guards there."

- - -

wc 1

THE COURT: At this time we will excuse the jury for a few moments.

(The jury left the courtroom.)

THE COURT: Are there any motions at this time?

MR. LITTAU: Yes, your Honor.

At this point defendants Dic-Underhill group renew their motion made at the close of plaintiff's case for a dismissal, and in addition move the Court for a directed verdict in favor of defendants under Rule 50, based upon the entire evidence taken throughout the entire case, primarily on the ground that plaintiff has failed to establish a case of defendants' failing under all circumstances to take whatever reasonable care was required, and thus failing to prove negligence on behalf of the defendants.

THE COURT: Do you want to be more specific?

MR. LITTAU: Yes, your Honor. We have the testimony that there were civilian guards. We have the testimony that there were Port Authority police officers at the construction site. We have the testimony about the perimeter fence. We have the testimony as to the weight and, if I may interject, the inherent, really, lack of mobility of this 15-foot-long, 8-foot-high, 6 or 7 feet wide, 16,000-pound compressor that was brought to the site on a flat-bed trailer, that was positioned at the time it

wc 2

was stolen, at what had been a street intersection, as is indicated by Mr. Philip on Exhibits G and H, which is quite obvious in our own experience to be some hundreds of feet in any direction from a publicly traveled street, access to which is possible -- was possible then through a locked gate on one hand, used primarily for access by fire department and other emergencies, and a chained or patrolled gate on the south side, with other means of access perhaps being available to pedestrians but not to trucks.

Under all the circumstances, your Honor, I don't think that the burden of doing something more, especially in view of the fact that the contractor had been at that point on the job since at least the beginning of 1969, had had far more mobile equipment on the job and had not suffered the theft or loss by mysterious disappearance of any major piece of construction equipment, be it owned by him or released by him. Those are the specific bases.

THE COURT: Let me ask you this with respect to this negligence claim by the plaintiff in this case. I gather that there is no claim on your part that the plaintiff was contributorily negligent.

MR. LITTAU: No, I don't claim that at all, your Honor.

THE COURT: So that that is not something I would

wc 3

have to charge the jury on.

MR. LITTAU: No.

THE COURT: Normally, as you know, freedom from contributory negligence under New York law is an essential element of negligence. Isn't that so?

MR. LITTAU: That is exactly right, your Honor.

THE COURT: So, as to that, we don't have any claim here. There has been no proof that the plaintiff was contributorily negligent. Is that it?

MR. LITTAU: No, they did what Hertz or Avis, let us say, would do. They would turn over a piece of equipment, and our client did what the --

THE COURT: I don't want any explanation. I just want to know whether we have any contributory negligence issue in this case.

MR. LITTAU: No. I am not going to urge that, your Honor.

THE COURT: Do you want to reply to the motion for a directed verdict here?

MR. FISCHER: Well, I think Mr. Littau's statement is really the type of statement he should make to the jury to urge that he was not negligent in that he took the proper precautions as a prudent man would take. I think, however, that there is substantial evidence before the

wc 4

jury to conclude that they did not take the proper precautions.

First, the police report, which indicates that the area of Greenwich and Cortlandt is an open construction area. The entire area is unsecured and open to public view and accessible. That is one police report.

THE COURT: As to that particular report -- is that the one you put in first?

MR. FISCHER: It is part of the entire report.

THE COURT: I just want to know --

MR. FISCHER: The part I read is the part I put in first.

THE COURT: But you recall that Mr. Littau insisted that the next lines be read. Do you remember that?

MR. FISCHER: OK.

MR. LITTAU: It was the introductory line, your Honor, the one that is in print, which indicates, really, whence this information comes.

THE COURT: You also wanted read in the remainder of the typed portion.

MR. LITTAU: Yes, your Honor, I did ask for that.

THE COURT: What was the purpose of that?

MR. LITTAU: Just so the jury would have the

wc 5

entire thing.

MR. FISCHER: It talks about insurance and I didn't understand why he wanted that before the jury, and that is one reason I didn't read the entire thing, because I didn't think that the jury should be dealing with that.

THE COURT: Well, I don't think so either, Mr. Littau. That should never have been read to the jury.

MR. LITTAU: That is another question, your Honor.

THE COURT: That somebody find that the Port Authority owned it and therefore it was covered by some kind of insurance. That has absolutely no relevance to this case.

MR. LITTAU: I don't think that the entire report has any relevance, your Honor.

THE COURT: Well, that is another issue.

MR. LITTAU: That is the point.

THE COURT: I am talking about what you wanted read to the jury, which had nothing to do with this case whether it was covered by insurance or whether somebody alleged that the true owner was the Port Authority. Because that certainly does not appear to be the case if the Port Authority owned the equipment. I don't think anybody made that claim.

wc 6

MR. LITTAU: Well, one piece, your Honor, was owned by the Port Authority.

THE COURT: Which one?

MR. LITTAU: The one that was purchased by Dic-Underhill for $29,000 in 1970. That is owned by the Port Authority, because Dic-Underhill purchased it as agent of the Port Authority.

THE COURT: I see. So it was referring to that?

MR. LITTAU: It may have been, your Honor.

THE COURT: In any event, that is irrelevant and the jury will be so instructed.

MR. FISCHER: Shall I continue, your Honor, as to the theories of negligence?

THE COURT: Yes, yes.

MR. FISCHER: Patrolman Rambousek testified that the compressor was next to two gates. One of them had a guard and the other one didn't have a guard. And I think that prudence would dictate that when you have gates where vehicles could be rolled in and out, you secure it. He said it was unsecured, and that if someone opened the lock, equipment could be rolled out.

Other elements of proof of negligence were that testimony was -- of their own compressor engineer -- that other compressor users had removed tires. Of course, it

wc 7

took some labor and some expense, but others had done it. In this case it wasn't done.

THE COURT: Others had done it?

MR. FISCHER: That is what his deposition said.

THE COURT: Whose deposition?

MR. FISCHER: Mr. DeMattei. And Mr. Wollerman's testimony was that in his experience other compressor manufacturers removed the tire, which was like removing a tire on a car, so that you needed a bigger jack. And since the compressor was in place for five days, there is no reason why that could not have been taken off by spending an hour of effort, leaving it there for five days, and then putting it on when they wanted to move it.

Mr. Wollerman testified that that would completely immobilize the machine and that other users of compressors have used it, and Mr. Mattei in his deposition said that had been a practice of others but not of Dic-Underhill.

That again is a question of negligence.

Further, they didn't have a watchman. They had hundreds of thousands of dollars of their own equipment, and the guy went home at 4:30, and there was nobody there, and they were relying on the Port Authority's five policemen and approximately twenty security guards to cover this sixteen or eighteen acre site.

wc 8

The question then is, was this prudent to have all these people, were they enough, and why weren't they at the gates, which seems to be the logical place to locate yourself in a situation like that.

I think, taken all together -- and removal of the tow bar was another possibility. There were a number of possibilities of disabling the compressor: deflating the tire, taking one off, taking off the tow bar, chaining the tow bar to a gate, to a fixed structure.

THE COURT: What would have led them to do that? I don't understand.

MR. FISCHER: To prevent it from being stolen.

THE COURT: The evidence, as I understand it, is that no such equipment had ever been stolen before.

MR. FISCHER: From this site, from Dic-Underhill, that is true.

THE COURT: Is there any evidence that any such equipment was ever stolen from any construction site?

MR. FISCHER: Mr. Wollerman testified -- he was asked by Mr. Littau how many of these had been stolen, and I think he said, my recollection is, five, four or five.

MR. LITTAU: Two.

MR. FISCHER: Not Dic-Underhill's compressors,

wc 9

but that in the general metropolitan area there had been thefts of compressors.

THE COURT: I see.

MR. FISCHER: Summing up, your Honor, I think it is all a question for the jury to weigh and decide and determine as to whether or not this lessee took prudent care under the circumstances for my equipment, the plaintiff's equipment.

THE COURT: The motion made by the defendant at the end of the entire case to dismiss the case, or, rather, for a directed verdict in favor of the defendant is denied.

* * *

AMENDED JUDGMENT.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

GARDNER-DENVER COMPANY, :

Plaintiff, : 75 Civ. 5417 (CBM)

-against- : AMENDED JUDGMENT

DIC-UNDERHILL CONSTRUCTION COMPANY, DIC-CONCRETE CORP., DIC-UNDERHILL J.V. & CO., DIC-UNDERHILL JOINT VENTURE and THE PORT AUTHORITY OF NEW YORK and NEW JERSEY, :

Defendants. :

----------X

The issues in the above entitled action having been brought on regularly for trial, before the Honorable Constance Baker Motley, United States District Judge, and a jury, on October 5, 6, 7 and 8, 1976, and the Court having submitted the attached special questions to the jury, and the jury having answered the said questions, and the jury thereafter having returned a verdict in favor of the plaintiff, and the attached judgment in the amount of $29,000 in favor of plaintiff Gardner-Denver Company against defendants Dic-Underhill Construction Company, Dic-Concrete Corp., Dic-Underhill J.V. & Co., Dic-Underhill Joint Venture having been entered on October 18, 1976, and plaintiff having moved to amend the judgment to provide for the award of interest at the rate of 6% per annum on the $29,000 judgment, from August 16, 1973, and defendants making no opposition to said motion, it is

ORDERED, ADJUDGED and DECREED: That plaintiff GARDNER-DENVER COMPANY have judgment against defendants DIC-UNDERHILL CONSTRUCTION COMPANY, DIC-CONCRETE CORP., DIC-UNDERHILL J.V. &

AMENDED JUDGMENT

CO., DIC-UNDERHILL JOINT VENTURE in the amount of $29,000, together with interest thereon at the rate of 6% per annum from August 16, 1973, being the sum of $5,505.00, for a total judgment of $34,505.00.

Dated: New York, N. Y.
November 5, 1976

Clerk

APPROVED:

U.S.D.J.

DEFENDANTS' EXHIBIT B.

CHARGE TO
Dic & Underhill Agents
Port of New York Authori.
2 World Trade Center
New York, New York 10048

COMPRESSOR & HOCK SERVICE

REMIT TO
P.O. BOX

320580

Verbal

335 989 1197

INVOICE DATE
8 20 73

SEND ALL OTHER MAIL TO LOCAL SALES OFFICE

SHIP TO
Same
World Trade Center
West End Avenue & Vesey Street
New York, New York

PLEASE SHOW ACCOUNT CODE AND INVOICE NUMBER ON YOUR CHECK. TERMS 30 DAYS NET.

RENTAL INVOICE

"SOLD"

SHIPPED VIA	F.O.B. OUR WAREHOUSE	DATE SHIPPED	SALESMAN
15 4 4	Mahwah, New Jersey	8 3 73	Cowan Brothers

QUANTITY	MODEL (PART NO.)	DESCRIPTION AND SERIAL NUMBER	LIST EACH	EXTENSION
	RENTAL FROM	THRU		
		Rental began on 8/3/73 for which there		
		will be no charge, compressor was sub-		
		sequently stolen. Customer billed as		
		follows:		
1	SP1200DZ	Compressor S/N 599554 GJ Engine S/N		
		127A24610		29,000 00

SALES OR USE TAX (0%)

TRANSPORTATION (82.47%)

INVOICE TOTAL $ 29,000.00

STATE	CLASS	SALESMAN	DIV	LINE	MODEL	QTY		
31	5	1234	2					29,000

CO 2492 QUINCY ACCOUNTING - WHITE NUMERICAL FILE - GREEN
CUSTOMER FILE - PINK SALESMAN - GOLDENROD

▷ RENTALS OF CONSTRUCTION EQUIPMENT ◁

USA 586-178
(REV. 4-23-71)

DEFENDANT

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

B

OCT 6 - 1976

DEFENDANTS' EXHIBIT C.

GARDNER-DENVER COMPANY

PLEASE REPLY TO

386 State Highway No. 17
Mahwah, New Jersey 07430
February 27, 1974

Dic-Underhill
Agents of New York Port Authority
2 World Trade Center
New York, New York 10048

Gentlemen:

The following information was requested by you on Gardner-Denver Model SP1200DE Compressor s/r 599554 which was stolen from your job site at the World Trade Center.

One - Gardner-Denver Model SP1200DE with s/r 599554 and engine s/r GM 12VA24610.

List price of above unit ---------- $ 51,570.00

Less discount ---------- $ 43,304.00

Less cumulative rent ---------- $ 14,304.00

Selling price ---------- $ 29,000.00

If further information is needed please contact the writer.

Yours very truly,

GARDNER-DENVER COMPANY

Hank J Zuretti.

Hank Zuretti
Sales

DEFENDANTS' EXHIBIT I.

2. GENERAL AGREEMENT

The Contractor agrees to furnish and install all concrete construction, cement fill and finish and related work for Tower A, Tower B and Below Grade areas and the PATH Terminal at the World Trade Center within the perimeter (slurry) walls at the construction site, starting with a base slab on grade (including, however, certain pits below) and to furnish all structures, equipment, plant, labor, materials and other facilities and to do all other things necessary or proper therefor or incidental thereto, except that materials purchased for the Authority as hereinafter provided and the use of construction equipment rented from others as provided below shall be furnished by the Authority to the Contractor for use in the performance of said Work all in strict accordance with the Contract Drawings and Specifications and any future changes therein; and the Contractor further agrees to assume and perform all other duties and obligations imposed upon him by this Contract.

Subject to the clause hereof entitled "Withholding of Payments" the Authority agrees to pay the Contractor and the Contractor agrees to accept from the Authority in full consideration for the performance by the Contractor of his duties and obligations under this Contract and the whole thereof, a compensation consisting of the following amounts:

(a) An amount equal to the Net Cost of the Work performed by the Contractor, computed in the manner prescribed in the clause hereof entitled "Net Cost"; and

(b) A fee, herein called the Contractor's Fee, computed in the manner prescribed in the clause hereof entitled "Contractor's Fee", such fee being full compensation for overhead, profit and all other expenses in connection with this Contract, whether or not presently foreseen or foreseeable other than the expenses specifically included in the Net Cost, regardless of the amount of Net Cost.

This Contract is one entire contract for the accomplishment of the results and the doing of the things specified in this numbered clause and is not separable. Similarly, the Contractor's compensation is one entire compensation for entire performance on his part.

The Contractor shall act as the agent of the Authority, subject to the provisions in this numbered clause and elsewhere in this Contract relating to such agency, for the purchase of all materials, including all tools, temporary materials and equipment necessary or proper for or incidental to the installation of all concrete construction, cement fill and finish and related work for Tower A, Tower B and Below Grade areas and the PATH Terminal at the World Trade Center within the perimeter (slurry) walls at the construction site, starting with a base slab on grade and, in the exercise of such agency shall assume all the obligations and duties imposed upon him by this Contract.

DEFENDANTS' EXHIBIT I

Subject to the provisions of the clauses hereof entitled "Advances and Payments" and "Solicitation of Bids", the Authority will advance to the Contractor sums for the payment of purchases by the Contractor as agent of the Authority for materials, tools and equipment.

The Contractor shall also act as the agent of the Authority, subject to the provisions of this numbered clause relating to such agency, for the rental of all construction equipment necessary or proper for or incidental to the performance of the Contract and, in the exercise of such agency shall assume all the obligations and duties imposed upon him by this Contract. "Construction Equipment" as used in this numbered clause shall include plant.

The Authority will provide the Contractor with a statement to be furnished by him to Lessors of construction equipment which will identify this Contract as the one under which the Contractor is authorized to rent said equipment and which will identify the site to which delivery must be made. The Contractor shall arrange for delivery of said equipment directly to the construction site.

Notwithstanding the above agency Agreement, the Authority shall not be liable to Lessors of construction equipment for any amounts except rental charges based on time of use of such equipment, and the Contractor's agency is limited accordingly.

DEFENDANTS' EXHIBIT I

The agency provided for hereunder shall not relieve the Contractor of any of his duties and obligations elsewhere provided for under this Contract.

The Contractor represents that he possesses specialized skill and extensive experience in the purchase of materials, tools and equipment, and rental of equipment which skill and experience he will use to execute all purchases and rentals, as aforesaid, so as to achieve the lowest possible price for such material, tools and equipment and substantial savings to the Authority in time and money, and the Authority in executing this Agreement has relied upon such representations.

The Contractor shall be deemed to occupy a position of trust and confidence with respect to the Authority and to have the obligation of protecting the Authority's interests in all dealings related to performance of the Contractor's services and of keeping the Authority's obligations and expenses to a minimum consistent with satisfactory performance of this Agreement. The Contractor shall not directly or indirectly either solicit or receive, and shall insure that no subsidiary or affiliate of the Contractor or any Director, officer or employee of any of the foregoing shall directly or indirectly either solicit or receive, anything of value from any person in connection with any aspect of the construction of The World Trade Center whether or not actually given or to be given in consideration for any act or forbearance to act by the Contractor. The Contractor shall make prompt and full disclosure in writing to the Director of any interest which the Contractor may have, or which any subsidiary or affiliate of the Contractor or any Director, officer or employee, at or above the equivalent rank of foreman, of any of the foregoing may have, direct or indirect and present or potential, in any Contractor, materialman or other person performing any part of the construction of The World Trade Center, and in any product, process, equipment, materials, system or other thing to be used in such construction. Inasmuch as the Authority is a public agency dealing with public funds and is retaining the Contractor in order to rely on the Contractor's special experience, expert advice and skill in protecting the Authority's interests, the Contractor shall be held to the highest degree of good faith in its dealings with the Authority.

The Authority shall have the option of designating the Contractor, to sell for salvage, as agent for the Authority, used materials, including tools and equipment and the Contractor represents that he will use his specialized skill and experience to obtain the highest possible sale price for such material, tools and equipment. All proceeds from the sale for salvage of the aforementioned materials, shall be remitted to the Authority and shall be credited to the Net Cost of Sale and Work.

The enumeration in this Form of Contract and in the Specifications of particular things to be furnished or done, shall not be deemed to imply that only things of a nature similar to those enumerated shall be so furnished or done, but the Contractor shall furnish all Materials and perform all Work as required, without other compensation than that specifically provided, whatsoever changes may be made in the Contract Drawings and Specifications, whatsoever Materials and Work may be required in addition to that required by the Contract Drawings and Specifications in their present form, and whatsoever obstacles or unforeseen conditions may arise or be encountered.

DEFENDANTS' EXHIBIT I

3. EXEMPTIONS FROM NEW YORK STATE AND NEW YORK CITY SALES TAXES: PURCHASE OF MATERIALS AND RENTAL OF EQUIPMENT

PURCHASE OF MATERIALS, TOOLS AND EQUIPMENT AND RENTAL OF EQUIPMENT

The purchase by the Contractor of the materials, tools and equipment, and rental of equipment, as agent of the Authority hereunder, either directly or through subcontractors, will not be subject to New York State or New York City sales or compensating use taxes, provided that:

(1) Any such sub-contract agreements provide for the resale of any materials, tools or equipment separately and apart from the performance of any Work thereunder and that such sub-contract agreements separately state payments for the sale of materials, tools and equipment and separately state payments for the performance of the Work;

(2) The Contractor's and any subcontractor's use of construction equipment rented from others, and any agreement for such rental, is based upon the agency arrangement referred to in the clause hereof entitled "General Agreements";

(3) Delivery of said equipment is to the construction site;

(4) The Contractor or subcontractor has furnished to the lessor the statement from the Authority identifying this Contract as the one under which the Contractor or subcontractor has been authorized to rent said equipment and identifying the construction site to which delivery must be made;

(5) The invoices for any such material, tools and equipment are made out to the Authority or to the Contractor as agent for the Authority and prescribe the place of delivery.

(6) Payments shall have been made from the amounts to be advanced by the Authority, as provided in the clause hereof entitled "Advances and Payments".

INDEMNITY BY AUTHORITY

If (i) any claim is made against the Contractor by the State or City of New York for sales or compensating use taxes on the Purchase of the aforementioned materials, tools and equipment or such rental of construction equipment or (ii) any claim is made against the Contractor by a materialman, lessor or a subcontractor on account of a claim against such materialman, lessor or subcontractor by the State

DEFENDANTS' EXHIBIT I

41. NO ESTOPPEL OR WAIVER

The Authority shall not be precluded or estopped by any acceptance, certificate or payment, final or otherwise, issued or made under this Contract or otherwise issued or made by it, the Engineer, or any officer, agent, employee, consultant or contractor of the Authority, from showing at any time the true amount and character of Materials furnished or Work performed, or from showing that any such acceptance, certificate or payment is incorrect or was improperly issued or made; and the Authority shall not be precluded or estopped, notwithstanding any such acceptance, certificate or payment, from recovering from the Contractor any damages which it may sustain by reason of any failure on his part to comply strictly with this Contract, and any moneys which may be paid to him or for his account in excess of those to which he is lawfully entitled.

Neither the acceptance of the Contract or any part thereof, nor any payment therefor, nor any order or certificate issued under this Contract or otherwise issued by the Authority, the Engineer, or any officer, agent, employee, consultant or contractor of the Authority, nor any permission or direction to continue with the performance of the Contract, nor any performance by the Authority of any of the Contractor's duties or obligations, nor any aid lent to the Contractor by the Authority in his performance of such duties or obligations, nor any other thing done or omitted to be done by the Authority, its Commissioners, officers, agents, employees, consultants or contractors shall be deemed to be a waiver of any provision of this Contract or of any rights or remedies to which the Authority may be entitled because of any breach thereof, excepting only a resolution of its Commissioners, providing expressly for such waiver. No cancellation, rescission or annulment hereof, in whole or as to any part of the Contract, because of any breach hereof, shall be deemed a waiver of any money damages to which the Authority may be entitled because of such breach. Moreover, no waiver by the Authority of any breach of this Contract shall be deemed to be a waiver of any other or any subsequent breach.

41A. INDEMNITY BY AUTHORITY

(A) The Authority will defend, indemnify and hold harmless the Contractor and the principals of the Contractor against civil liability for all claims, losses, suits and causes of action of third persons, including the Authority, whatsoever arising out of or in connection with or relating to the Contractor's operations under this Contract, except for claims, losses, suits and causes of action arising out of or in connection with or relating to the gross negligence of said principals, or covered by insurance, to the extent of such insurance, provided that:

1. The Contractor gives immediate written notice to the Authority of any such claim, loss, suit or cause of action, cooperates promptly and to the fullest extent with the Authority and its designated attorney in defending against the same and furnishes promptly all information, documents and other material in its possession or control necessary or convenient in the opinion of such attorney for such defense;

DEFENDANTS' EXHIBIT I

2. The Authority is afforded the opportunity by the Contractor before any action is taken by the Contractor with respect to any such claim, loss, suit or cause of action to negotiate with respect thereto and is authorized by the Contractor to contest the same in the manner and to the extent which the Authority may choose and to settle or satisfy the same and that such attorney as the Authority may designate is authorized by the Contractor to act for all such purposes; and

3. The Contractor gives written notice to the Authority as soon as practicable upon the happening of an occurrence of which the Contractor knows, or should have known, that seems reasonably likely to involve liability on the part of the Contractor or the Authority.

As used herein, "principals" shall mean the officers of Dic Concrete Corporation and Underhill Construction Corporation, "the Contractor" shall mean the DIC-Concrete Corporation, the Underhill Construction Corporation and "DIC-Underhill, a Joint Venture".

There shall also be excepted from the indemnity provided by this numbered clause any claim, loss, suit or cause of action by any of the indemnitees under this numbered clause against any other of the indemnitees under this numbered clause.

(B) The Authority shall be subrogated to all rights of recovery which the Contractor may have against any third person on account of the claims provided for under (A) of this numbered clause. The Contractor shall not in any way impair such right of subrogation or the value thereof and shall execute such assignments, authorizations and other documents as the Authority may find necessary, desirable or convenient for the Authority to enforce such right of subrogation.

(C) The expense of defending against such claims and of enforcing such right of subrogation shall be borne by the Authority except that the Contractor shall bear the expense of furnishing the time of its Personnel who may be required by the Authority in such defense or enforcement and of furnishing information, documents and other material from its records which may be required by the Authority in such defense or enforcement and which is in its possession or control.

(D) In the event that the Authority requests the Contractor to defend on its own behalf any such claims of third persons, the Authority will reimburse the Contractor an amount equal to the actual expenditures, in reasonable amounts, for attorneys fees incurred by the Contractor in such defense, and court costs and fees, provided, however, that the Contractor shall not incur any such expenses without the previous written approval of the Authority.

DEFENDANTS' EXHIBIT J.

CHARGE TO
Port of Authority
C/O Dic Underhill
40 Cortland St.
N.Y.C., N.Y.

COMPRESSOR & ROCK SERVICE
division of Gardner-Denver

C-79

APR 20 1970

INVOICE NUMBER 335 989 0880

REMIT TO P.O. BOX 93406 CHICAGO, ILL. 60690

SEND ALL OTHER MAIL TO LOCAL SALES OFFICE

737100 ACCOUNT CODE

CUSTOMER ORDER NUMBER #4014

INVOICE DATE 4 17 70

SHIP TO World Trade Center

SAME AS SOLD TO UNLESS OTHERWISE SHOWN.

PLEASE SHOW ACCOUNT CODE AND INVOICE NUMBER ON YOUR CHECK. TERMS - 30 DAYS NET.

JUN 17 1970
06003

RENTAL INVOICE

MKT	RE	TC	SHIPPING CHARGES PPD	SHIPPING CHARGES COL	F.O.B. OUR WAREHOUSE	DATE SHIPPED	VIA
16	4						

QUANTITY	MODEL (PART NO.)	DESCRIPTION AND SERIAL NUMBER	LIST EACH	EXTENSION
	RENTAL FROM	THRU		
1	SP 1200	SOLD Dic-Underhill, A Joint Venture S/N 553900		29,350.00
		Ord. & Checked By		
		P.O. Number 4315		
		Price Checked		
		Extensions Checked		
		Check Number #1927		
		Date Issued 10/9/70		
		COST CODE 907		

WE HEREBY CERTIFY THAT THESE GOODS WERE PRODUCED IN COMPLIANCE WITH ALL APPLICABLE REQUIREMENTS OF SECTIONS 6, 7 AND 12 OF THE FAIR LABOR STANDARDS ACT AS AMENDED AND OF REGULATIONS AND ORDERS OF THE UNITED STATES DEPARTMENT OF LABOR ISSUED UNDER SECTION 14 THEREOF.

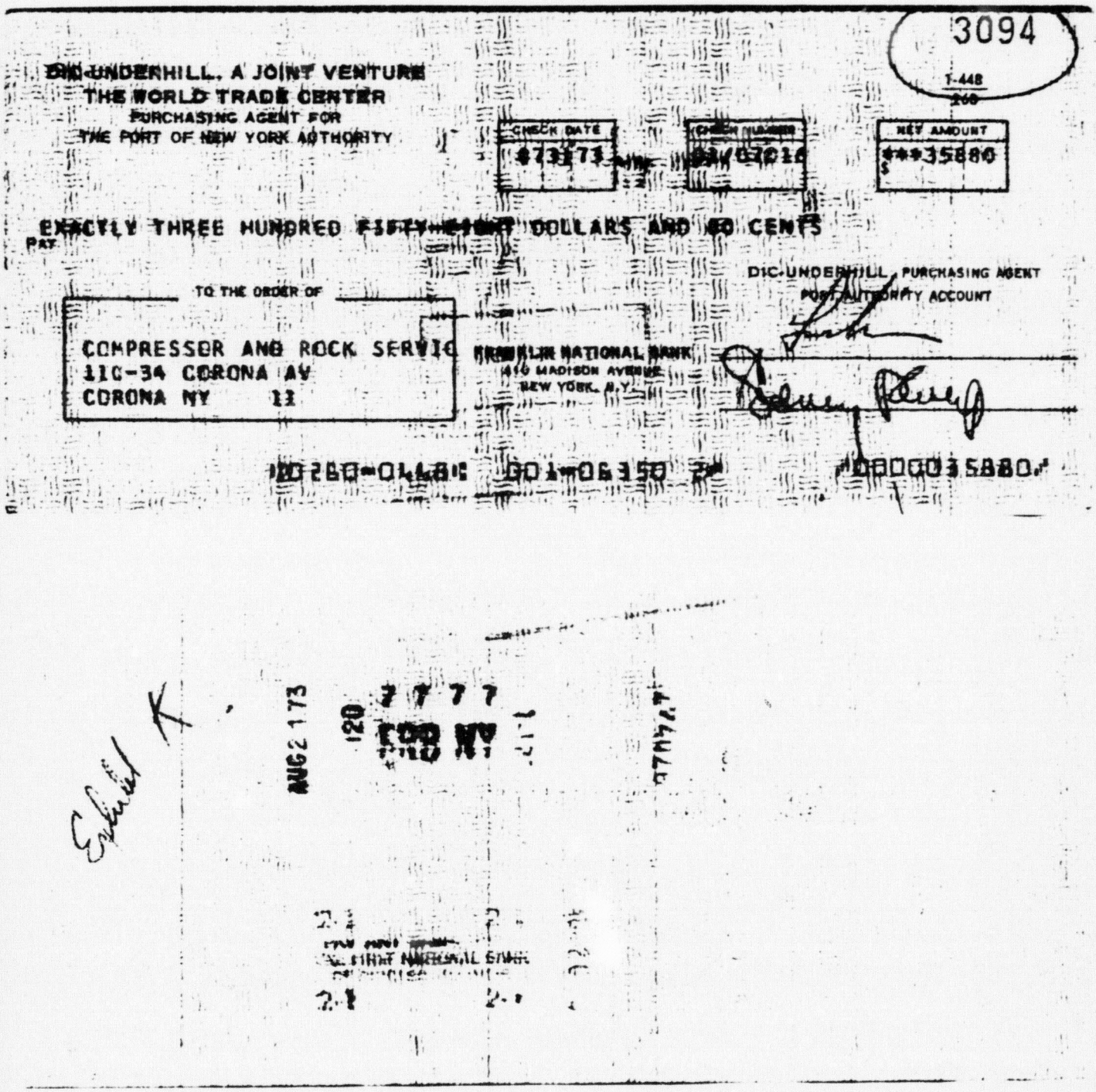
STATE	C TAX S		SALESMAN	DIV	LINE	MODEL	QTY
31	5	6	1234				

CUSTOMER INVOICE

▶ RENTALS OF CONSTRUCTION EQUIPMENT ◀

SALES OR USE TAX (89)	
TRANSPORTATION (97-408)	
FUEL (98 - 333) Gals. @	
INVOICE TOTAL	$29,350.00
PAY THIS AMOUNT ▲	

DEFENDANTS' EXHIBIT K.



3094

T-448
260

DIC-UNDERHILL, A JOINT VENTURE
THE WORLD TRADE CENTER
PURCHASING AGENT FOR
THE PORT OF NEW YORK AUTHORITY

CHECK DATE 8/23/73

CHECK NUMBER 3A07016

NET AMOUNT $***358.80

PAY EXACTLY THREE HUNDRED FIFTY-EIGHT DOLLARS AND 80 CENTS

TO THE ORDER OF

COMPRESSOR AND ROCK SERVIC
110-34 CORONA AV
CORONA NY 11

FRANKLIN NATIONAL BANK
416 MADISON AVENUE
NEW YORK, N.Y.

DIC-UNDERHILL, PURCHASING AGENT
PORT AUTHORITY ACCOUNT

⑈260-0148⑈ ⑆021-06150⑆ ⑈0000035880⑈

Exhibit K

AUG 21 73

120 7777
FOR NY

DEFENDANTS' EXHIBIT L.

3093

260

DIC-UNDERHILL, A JOINT VENTURE
THE WORLD TRADE CENTER
PURCHASING AGENT FOR
THE PORT OF NEW YORK AUTHORITY

CHECK DATE	CHECK NUMBER	NET AMOUNT
07 13 73	01707013	***16.40

PAY EXACTLY SIXTEEN DOLLARS AND 40 CENTS

TO THE ORDER OF

COMPRESSOR AND ROCK SERVIC
110-34 CORONA AV
CORONA NY 11

FRANKLIN NATIONAL BANK
410 MADISON AVENUE
NEW YORK, N.Y.

DIC-UNDERHILL, PURCHASING AGENT
PORT AUTHORITY ACCOUNT

⑈0260⑈04468⑈ 001⑈06350 2⑈ ⑈000001640⑈

THE FRANKLIN BANK

COPY RECEIVED JAN 31 1977

Date: _____

Lefrak, Fischer, Myerson & Mandell

By: A Blumenfeld

LEX PRINTING COMPANY, Inc., 451 Greenwich Street, N. Y. C. 966-4300